

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 833

THE LINCOLN NATIONAL LIFE INSURANCE
COMPANY, APPELLANT,

vs.

JESS G. READ, INSURANCE COMMISSIONER OF
THE STATE OF OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

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IN DISTRICT COURT OF OKLAHOMA COUNTY

No. 105,488.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff,

vs.

JESS G. READ, The Insurance Commissioner of the State of Oklahoma; and CARL B. SEBRING, State Treasurer of the State of Oklahoma, Defendants

PETITION.—Filed March 27, 1942

Comes now The Lincoln National Life Insurance Company, a corporation, plaintiff, and respectfully avers that it is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, with its principal place of business at Fort Wayne in said state, and is now and has been for many years engaged in the life insurance business; that plaintiff is and has been during all of the times herein mentioned duly licensed and authorized to transact its business of insurance in the State of Oklahoma, and has paid all taxes and fees lawfully assessed or imposed by the State of Oklahoma for the rights and privileges aforesaid.

That the defendant Jess G. Read is the duly elected, qualified and acting Insurance Commissioner of the State of Oklahoma.

[fol. 11] That the defendant Carl B. Sebring is the duly elected, qualified and acting State Treasurer of the State of Oklahoma.

First Cause of Action

I

Plaintiff, for its first cause of action, avers that Section 1, Chapter 1a, Title 36, Session Laws of Oklahoma, 1941, otherwise known as House Bill No. 353 (Sec. 104, Title 36,

Oklahoma Statutes 1941), approved effective on April 25th, 1941, provides as follows:

•• Reports—Gross Premiums.

•• Section 1. That Section 10478, Oklahoma Statutes of 1931 be and is hereby amended to read as follows:

“Every foreign insurance company, copartnership, association, inter-insurance exchange or individual who is a nonresident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in [fol. 12] this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, which tax, in addition to an annual tax of three dollars (\$3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars (\$500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State.”

II

[fol. 13] That Section 10478, Oklahoma Statutes of 1931, provides as follows:

"Foreign Companies—Annual Report of Premiums—Fees and Taxes.

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision [fol. 14] or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

III

That plaintiff on the 28th day of February, 1942, delivered to the defendant Jess G. Read, the Insurance Commissioner of the State of Oklahoma, its written report under oath according to the provisions of House Bill No. 353 above-quoted; that said report is on file in the office of said defendant and is by reference to such record made a part hereof.

IV

That as shown by the report referred to in the preceding paragraph, the gross premiums received by plaintiff in the State of Oklahoma within the twelve months next preceding the first day of January, 1942, amounts to the total [fol. 15] sum of \$156,897.19, and the dividends paid by plaintiff to policy holders amount to the sum of \$923.80, and cancellations to policy holders amount to the sum of \$73,408.21.

V

That by virtue of the statutes above quoted, a tax is imposed on all premiums collected in the State of Oklahoma, after all cancellations and dividends to policy holders are deducted; that on all such premiums (less the deductions so authorized) collected prior to the 25th day of April, 1941, when said House Bill No. 353 became effective, a tax of 2% is imposed; that on all such premiums (less the deductions so authorized) collected on or after the 25th day of April, 1941, a tax of 4% is imposed.

VI

That the amount of the tax of 2% on all premiums received by plaintiff and collected in the State of Oklahoma less the deduction authorized by law for the period beginning January 1st, 1941, and ending April 24th, 1941, is the sum of \$847.18; that the defendant Insurance Commissioner demanded that plaintiff pay a tax in the sum of \$3302.61, said sum being 4% on the amount of the premiums, less the amount of the dividends and cancellations as set forth in paragraph IV hereof; that plaintiff at the time of filing its report as set forth in paragraph III hereof paid to [fol. 16] the defendant Insurance Commissioner, pursuant to his demand as aforesaid, the said sum of \$3302.61, being the amount of tax alleged by said defendant to be assessed and levied against plaintiff under and by virtue of said House Bill No. 353, and for which payment plaintiff has received a receipt issued by said defendant under date of March 2d, 1942; that said payment includes the sum of \$1651.31 which was paid under protest by plaintiff pursuant to a notice served according to law upon the defendants and each of them at the time of such payment. A true and correct copy of said notice, marked "Exhibit A", is

hereto attached and made a part hereof. That the defendants and each of them have failed and refused to repay to plaintiff the sum so paid under protest.

VII

That the tax so paid under protest is illegal and the law provides no appeal from unlawful demands and actions of the defendant Insurance Commissioner, as particularly set forth in said notice of protest (Exhibit A hereto attached); that it is the duty of the defendants and each of them, as provided by law, to hold such taxes separate and apart from all other taxes collected until the final determination of this suit.

Second Cause of Action

I

Plaintiff, for its second cause of action against the defendants, and each of them, makes a part hereof as if fully set forth at length all of the allegations of its first cause of action.

II

Plaintiff further avers that plaintiff received a letter under date of March 3d, 1942, from the defendant, Insurance Commissioner, acknowledging receipt of plaintiff's annual statement together with attached forms, and wherein said defendant advised plaintiff as follows, to-wit:

"I do not believe that you are entitled to deduct as cancellations \$73,408.21 representing cash values paid on surrender of life insurance policies. Unless you can present convincing evidence that this deduction should be allowed your license will not be issued until the 4% gross premium tax is paid on said amount."

III

That thereafter the defendant Insurance Commissioner demanded that plaintiff pay a tax in the sum of \$2936.33, said sum being 4% on the sum of \$73,408.21; that said sum of \$73,408.21 constitutes the amount of cancellations to policy holders as reported to the defendant Insurance Commissioner at the time and in the manner set forth in plaintiff's first cause of action; that the amount of such

[fol. 18] cancellations consists of surrenders and terminations of life insurance contracts and payments thereon made to policy holders according to the terms and provisions of such contracts, and is a proper and lawful deduction from the amount of the premiums received by plaintiff in the State of Oklahoma within the twelve months next preceding the first day of January, 1942, in determining the amount of the tax to which plaintiff is subject and obligated to pay according to the provisions of the statutes above quoted; but the defendant Insurance Commissioner unlawfully disallowed as a deduction the amount of such cancellations as aforesaid.

IV

That, on the 19th day of March, 1942, plaintiff paid to the defendant Insurance Commissioner pursuant to his demand as aforesaid the said sum of \$2936.33, being the amount of tax alleged by said defendant to be assessed and levied against plaintiff under and by virtue of said House Bill No. 353, and for which payment plaintiff has received a receipt issued by said defendant under date of March 19th, 1942; that said payment was made under protest by plaintiff pursuant to a notice served according to law upon the defendants and each of them at the time of such payment, a true and correct copy of such notice, marked "Exhibit B" is hereto attached and made a part hereof. That the defendants and each of them have failed and refused to repay to plaintiff the sum so paid under protest:

[fol. 19]

V

Plaintiff contends that the words of the statutes above quoted, which exempt from the tax thereby imposed "all cancellations . . . to policy holders," must necessarily include surrender values and all considerations paid to policy holders upon the surrender, termination, and cancellation of the contract of insurance.

VI

That the tax so paid under protest is illegal and the law provides no appeal from the unlawful demands and actions of the defendant Insurance Commissioner, as particularly set forth in said notice of protest (Exhibit B hereto attached); that it is the duty of the defendants and each of

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them, as provided by law, to hold such taxes separate and apart from all other taxes collected until the final determination of this suit.

Wherefore, plaintiff prays that it have and recover judgment herein determining and establishing: That the taxes in the sum of \$847.18 upon which plaintiff's first cause of action is predicated; and the taxes in the sum of \$2936.33 upon which plaintiff's second cause of action is predicated, were illegally collected, as not being due the State of Oklahoma; that such taxes so paid to the defendant Insurance Commissioner are in excess of the legal and correct amount [fol. 20] provided by law; and that there-upon the defendants, or either of them holding such taxes at the time, be ordered and directed to pay to plaintiff the sum of \$847.18 upon its first cause of action, and the sum of \$2936.33 upon its second cause of action.

Plaintiff further prays that the defendants and each of them be ordered and directed to keep and hold such taxes separate and apart from all other taxes collected until the final determination of this suit; and that plaintiff have such other and further relief as may be just and proper in the premises.

(Signed) Miley, Hoffman, Williams, France & Johnson, Attorneys for the Plaintiff.

Duly sworn to by Russell V. Johnson. Jurat omitted in printing.

[fol. 21] [File endorsement omitted.]

[fol. 22] EXHIBIT "A" TO PETITION

Protest of the Lincoln National Life Insurance Company
To Jess G. Read, Insurance Commissioner of the State of Oklahoma; State Capitol, Oklahoma City, Oklahoma;
To Carl B. Sebring, State Treasurer of the State of Oklahoma; State Capitol, Oklahoma City, Oklahoma.

GENTLEMEN:

You and each of you are hereby notified that The Lincoln National Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of

Indiana, and having its principal place of business at Fort Wayne, the State of Indiana, does hereby pay to the Insurance Commissioner of the State of Oklahoma the sum of Thirty-three Hundred Two and 61/100 Dollars (\$3302.61), demanded by said Insurance Commissioner, said sum being the amount of tax alleged to be assessed and levied against the undersigned under and by virtue of Section 10478, Oklahoma, Statutes 1931, and Chapter I a, Title 36, Session Laws of Oklahoma, 1941, otherwise known as House Bill 353, enacted by the Eighteenth Legislature, approved April 25, 1941, on all premiums collected in the State of Oklahoma by the Undersigned within the twelve months next preceding the first day of January, 1942; said sum so paid being four per cent (4%) of such premiums, less deductions allowed by law.

[fol. 23] That the amount of such tax upon said premiums collected by the undersigned in said state during the period beginning January 1, 1941, and ending April 25, 1941, the date of the approval of said act, is the sum of Sixteen Hundred Ninety-four and 36/100 Dollars (\$1694.36); that the amount of such tax upon such premiums collected by the undersigned in said state during the period beginning April 25, 1941, and ending December 31, 1941, was and is the sum of Sixteen Hundred Eight and 25/100 Dollars (\$1608.25).

That said payment includes the following amount which your protestant alleges is unconstitutional, illegal, excessive and void, to-wit:

Sixteen Hundred Fifty-one and 31/100 Dollars (\$1651.31) being tax in excess of two per cent on all premiums collected in Oklahoma on insurance policies during the calendar year 1941.

That said tax paid *paid* under protest, so alleged to be unconstitutional, illegal, excessive and void, is paid involuntarily, under duress and compulsion and under protest and only in response to the demand of said Insurance Commissioner; that said tax so paid under protest is unconstitutional, illegal, excessive and void for the reason and upon the grounds that said Act of April 25, 1941 does impose [fol. 24], said taxes upon this protestant and said Act should not be construed as imposing such taxes on this protestant; that said Act is a revenue measure, and the taxes sought to be imposed thereby are sought to be im-

posed exclusively upon protestant and other foreign insurance companies doing business in the State of Oklahoma, and not upon domestic insurance companies doing business within the State of Oklahoma; that such Act attempts to levy an arbitrary and discriminatory tax upon protestant after it was duly admitted to the State of Oklahoma and while it was and is a quasi citizen thereof and a person within its jurisdiction entitled to the equal protection of the laws; that by reason of the foregoing and other substantial grounds, said legislative acts purporting to assess said taxes and the acts of said Insurance Commissioner in demanding, receiving and collecting said taxes are each in contravention of the Constitution and laws of the United States of America, in that the same constitute and are a taking of the property of the undersigned without due process of law, as prohibited by the Fifth and Fourteenth Amendments of the Constitution of the United States of America and as prohibited by the Constitution of the State of Oklahoma, and constitute and are a denial to the undersigned of the equal protection of the laws, as prohibited by the Fourteenth Amendment to the Constitution of the United States of America and the provisions of the Constitution of the State of Oklahoma; that in paying said [fol. 25] tax under protest, the undersigned relies upon and expressly invokes the protection of all the applicable provisions of the Constitution and laws of the State of Oklahoma and the Constitution and laws of the United States of America, including (but not excluding others) the Fifth and Fourteenth Amendments to the Constitution of the United States of America, prohibiting the taking of property without due process of law and prohibiting the denial to any person of the equal protection of the laws.

You and each of you are hereby further notified that said tax so paid under protest, in the sum of Sixteen Hundred Fifty-one and 31/100 Dollars (\$1651.31), is unconstitutional, illegal, excessive and void and that said Insurance Commissioner is without power, authority or jurisdiction to assess, levy or collect the same, and that said tax is paid involuntarily and under protest for the purpose of avoiding burdensome penalties threatened to be imposed and to prevent the cancellation of the license of protestant to transact business within the state. Demand is hereby made that said sum so paid under protest, to-wit: the sum of

Sixteen Hundred Fifty-one and 31/100 Dollars (\$1651.31), be repaid and refunded to the undersigned protestant.

You and each of you are further notified that said taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma under and by virtue of [fol. 26] Section 1, Chapter 1-a, House Bill 353, Session Laws Oklahoma 1941, page 121, and said act, are each and all unconstitutional, and void for the further reason that such premium taxes are diverged by said act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma, and all of which is expressly prohibited by Article XIV of the Constitution of the State of Oklahoma.

You and each of you are further notified that unless said sum so paid under protest is repaid that protestant will, at the time and in the manner provided by law, institute suit for the recovery of the same, or take other appropriate action to protect its legal rights and that you and each of you shall segregate said fund and hold the same in a separate account and not pay the same into the State Treasury of this State for a period of thirty days from this date, and that if suit be filed within such period, that such fund so segregated shall be further held pending the outcome of said suit, all as provided by law.

This protest is executed in duplicate this 26th day of February, 1942.

The Lincoln National Life Insurance Company, by
R. F. Baird, Its Vice President.

[fol. 27]

Receipt

Receipt of duplicate original of the protest, of which the within and foregoing is a full, true and correct copy, is hereby acknowledged at the time of the payment of the tax therein mentioned.

Jess G. Read, by Andy Crosby, Jr., Asst. Insurance
Commissioner of the State of Oklahoma.

C. B. Sebring, State Treasurer of the State of Oklahoma.

[fol. 28] EXHIBIT "B" TO PETITION

Protest of the Lincoln National Life Insurance Company

To Jess G. Read, Insurance Commissioner of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

To Carl B. Sebring, State Treasurer of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

GENTLEMEN:

You and each of you are hereby notified that the Lincoln National Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Indiana and having its principal place of business at Fort Wayne in said State, does herewith pay to the said Insurance Commissioner of the State of Oklahoma the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars (\$2,936.33), demanded by said Insurance Commissioner, said sum being the amount of tax alleged to be assessed and levied against the undersigned under and by virtue of Sec. 10478, Oklahoma Statutes 1931 as amended and Chapter 1A, Title 36, Session Laws of Oklahoma 1941, otherwise known as House Bill 353, enacted by the Eighteenth Legislature, approved April 25, 1941, on the sum of Seventy-three Thousand Four Hundred Eight and 21/100 Dollars (\$73,408.21) which said Insurance Commissioner of the State of Oklahoma has disallowed as a deduction, [fol. 29] because of cancellations, from the premiums collected in the State of Oklahoma by the undersigned within the twelve months next preceding the first day of January, 1942, said sum so paid being four per cent (4%) of said cancellations;

That under said Section it is provided that there shall be imposed an annual tax of four per cent (4%) on all premiums collected in the State of Oklahoma, after all cancellations and dividends to policyholders are deducted and that the amount of cancellations claimed by said Insurance Company in submission of its annual report is the sum of Seventy-three Thousand Four Hundred Eight and 21/100 Dollars (\$73,408.21) for the twelve months next preceding the first day of January, 1941; that said sum has been disallowed by the said Insurance Commissioner as a deduction from the Premiums collected by said Insurance Company in the State of Oklahoma for the year reflected

by said annual report and by reason thereof the tax imposed by said Section is increased in the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars (\$2936.33);

That said payment in the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars (\$2936.33) constitutes a tax paid under protest and is illegal, excessive and void for the reason and upon the grounds that the cancellations for which the deduction was sought consist of surrenders and terminations [fol. 30] of life insurance contracts, said surrenders constituting cancellations within the intent and meaning of the act and/or a return of premiums for which deductions are claimed as allowable.

You and each of you are hereby further notified that said tax so paid under protest in the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars (\$2936.33) is illegal, excessive and void and that said Insurance Commissioner is without power, authority or jurisdiction to assess, levy or collect the same and that said tax is paid involuntarily and under protest for the purpose of avoiding burdensome penalties threatened to be imposed and in prevention of the cancellation of the license of protestant to transact business within the state. Demand is hereby made that said sum so paid under protest, to-wit, the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars (\$2936.33) be repaid and refunded to the undersigned protestant.

You and each of you are hereby further notified that unless said sum so paid under protest is repaid that protestant will at the time and in the manner provided by law institute a suit for the recovery of the same, or take other appropriate action to protect its legal rights, and that you and each of you shall segregate said funds and hold the same in a separate account and not pay the same into the State Treasury of this State for a period of thirty days from this [fol. 31] date, and that if a suit be filed within such period, that such funds so segregated shall be further held pending the outcome of said suit, all as provided by law.

This protest is executed in triplicate this 17th day of March, 1942.

The Lincoln National Life Insurance Company, by
R. F. Baird, Its Vice President.

Receipt of triplicate original of the protest of which the within and foregoing is a full, true and correct copy is

hereby acknowledged at the time of the payment of the tax therein mentioned.

Jess G. Read, by Andy Crosby, Jr., Asst. Insurance Commissioner of the State of Oklahoma. C. B. Sebring, State Treasurer of the State of Oklahoma.

[fol. 32-34] [File endorsement omitted.]

[fol. 35] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

SUMMONS AND RETURN—Filed April 3, 1942

The State of Oklahoma to the Sheriff of Oklahoma County in said State—Greeting:

You are hereby commanded to notify the defendants Jess G. Read, The Insurance Commissioner of the State of Oklahoma; and Carl B. Sebring, State Treasurer of the State of Oklahoma, that they have been sued by The Lincoln National Life Insurance Company, a corporation, in the District Court sitting in and for said County of Oklahoma, and that unless they answer by the 27th day of April, 1942, the petition of said plaintiff against said defendants filed in the District Court such petition will be taken as true and judgment rendered accordingly.

You will make due return on this summons on the 6th day of April, A. D. 1942.

Witness my hand and seal of said court, affixed at my office in Oklahoma City, Oklahoma, this 27th day of March, [fol. 36] 1942.

Cliff Myers, Court Clerk. (Signed) by Leonard Simpson, Deputy. (Seal.)

Suit Brought For recovery of taxes paid under protest in the total amount of \$3783.51.

If defendant — fail — answer, judgment will be taken as prayed in said petition.

Cliff Myers, Court Clerk. (Signed) by Leonard Simpson, Deputy. (Seal.)

(Return):

STATE OF OKLAHOMA,
Oklahoma County, ss.:

I received this writ March 27th, 1942, and executed the same in my County at the time and in the manner, as follows, to-wit:

Andy Crosby, Assistant Insurance Commissioner of the State of Oklahoma, March 28th, 1942, by delivering to the said Andy Crosby personally, in said County, a true and certified copy of the within summons with all endorsements [fols. 37-41] thereon, the said Jess G. Read, Insurance Commissioner of the State of Oklahoma being out of the City this 28th day of March, 1942.

Carl B. Sebring, State Treasurer of the State of Oklahoma, March 28th, 1942, by delivering to said defendant, personally, in said County, a true and correct copy of the within summons with all endorsements thereon.

Jess G. Read, Insurance Commissioner, of the State of Oklahoma, March 28th, 1942, by leaving for said defendant at the usual place of residence of each, in said County, a true and correct copy of the within summons with all endorsements thereon, to Mrs. Jess G. Read, his wife, a member of his family above the age of fifteen years.

George Goff, Sheriff. (Signed) by Chas. N. Sanders,
Deputy Sheriff.

[fol. 42] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

AMENDED PETITION—Filed May 19, 1942

Comes now the Lincoln National Life Insurance Company, a corporation, plaintiff, and leave of court being first obtained, files this, its amended petition, herein, and respectfully avers:

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, with its principal place of business at Fort Wayne in said state, and is now and has been for many years engaged in the life insurance business. The defendant Jess G. Read is the duly elected, qualified, and acting Insurance Commissioner of the State of Oklahoma. The defendant Carl

B. Sebring is the duly elected, qualified, and acting State Treasurer of the State of Oklahoma.

[fol. 43]

First Cause of Action

I.

Section 1, Chapter 1a, Title 36, Session Laws of Oklahoma, 1941, otherwise known as House Bill No. 353 (Sec. 104, Title 36, Oklahoma Statutes 1941, effective on April 25th, 1941, provides as follows:

"Section 1. That Section 10478, Oklahoma Statutes of 1931 be and is hereby amended to read as follows:

"Every foreign insurance company, a copartner-ship, association, inter-insurance exchange or individual who is a nonresident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted which tax, in addition to an annual tax of three dollars (\$3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars (\$500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this

State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

2

Section 10478, Oklahoma Statutes of 1931, provides as follows:

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same [fol. 45] time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

3

Plaintiff on the 28th day of February, 1942, delivered to the defendant Jess G. Read, The Insurance Commissioner of the State of Oklahoma, its written report under oath

according to the requirements of the Statutes of Oklahoma; and said report is on file in the office of said defendant and [fol. 46] is by reference to such record made a part hereof. Said report discloses the following transactions of plaintiff in the State of Oklahoma during the calendar year 1941, to-wit: \$156,897.19

Total amount of gross premiums received

Less:

Dividends to policy holders \$ 923.80

Cancellations to policy holders 73,408.2174,332.01

All premiums collected after deducting all cancellations and dividends to policy holders

\$82,565.18

4

Said House Bill No. 353 provides that any company failing to pay the premium tax as provided therein shall be subject to certain forfeitures and penalties, debarred from transacting any business of insurance in the State of Oklahoma until said taxes and penalties are fully paid, and revocation of the certificate of authority granted to the agents of that company to transact business in the State of Oklahoma.

5

At the time of filing its said report, plaintiff paid to the defendant Insurance Commissioner the sum of \$3302.61, representing a premium tax of 4% upon the item of \$82,565.18 disclosed by the report of plaintiff as above set forth.

6

Plaintiff received a letter under date of March 3d, 1942, from the defendant Insurance Commissioner, acknowledging receipt of plaintiff's annual statement together with attached forms, and wherein said defendant advised plaintiff as follows, to-wit:

[fol. 47] "I do not believe that you are entitled to deduct as cancellations \$73,408.21 representing cash values paid on surrender of life insurance policies. Unless you can present convincing evidence that this deduction should be allowed your license will not be issued

until the 4% gross premium tax is paid on said amount."

That on the 19th day of March, 1942, plaintiff paid to the defendant Insurance Commissioner the sum of \$2936.33, representing a premium tax of 4% upon the item of \$73,408.21 covering cancellations to policy holders as disclosed by the report of plaintiff above set forth.

7

The payments of the premium tax as recited in the preceding paragraphs 5 and 6 were made by plaintiff involuntarily under duress, compulsion, and pursuant to the demands of the defendant Insurance Commissioner, and to avoid the statutory forfeiture, penalties, revocation of its agents' certificates of authority, and its debarment from transacting its business in Oklahoma, and to prevent threatened deprivation and loss of its rights, interests, investments, and property within the State of Oklahoma. At the time such payments were made, plaintiff served notice according to law upon each of the defendants that such payments were made under protest, receipt of which notices were acknowledged by each of said defendants, as shown by such notices of protest, copies of which, marked "Exhibit A" and "Exhibit B", are hereto attached.

[fol. 48] The defendants and each of them have failed and refused to repay to plaintiff the fund so paid under protest, or any part thereof, but the amount thereof in the total sum of \$6238.94 is now held by the defendant Insurance Commissioner or is held by the defendant State Treasurer. Said funds are now and at all times subsequent to the payment thereof by plaintiff as aforesaid have been held separate and apart from all other funds or taxes collected by the defendants or either of them, and are now available to be repaid to this plaintiff in the event judgment be rendered in its favor.

9

During the month of October, 1919, the plaintiff qualified as a foreign life insurance company and was admitted to do business within the State of Oklahoma. Subsequent to that date plaintiff has continued to do business in the State of Oklahoma and has paid an annual license fee of \$200.00 each year from 1919 to 1942, both years inclusive, as required by

the Constitution and statutes of Oklahoma. Plaintiff has paid all taxes and fees lawfully assessed or imposed by the State of Oklahoma and in all respects has complied fully with all the requirements of the statutes of Oklahoma.

10

In conduct of its business and through the efforts of its agents and representatives within the State of Oklahoma, plaintiff has obtained a large number of policy holders, built up good will and established a successful and valuable life insurance business within said state. It has assembled at great expense information and records respecting its policy holders and business within said state. A substantial [fol. 49] part of plaintiff's assets and business within Oklahoma are in their nature personal to plaintiff, without use or value to others, and are not subject to lease or sale to others. If plaintiff were to be deprived of the privilege of doing business within the State of Oklahoma, or subjected to the illegal taxes and impositions as threatened by the provisions of House Bill No. 353, and the acts and conduct of the defendants aforesaid, it would suffer irreparable loss and injury; be deprived of the equal protection of the laws and of its property without due process of law, as more fully hereinafter set forth.

11

Insurance companies incorporated and existing under and by virtue of the laws of the State of Oklahoma, being resident or domestic corporations as distinguished from foreign or non-resident corporations subject to the provisions of House Bill No. 353, have been at all times authorized to issue contracts or policies of insurance identical in effect with those issued by this plaintiff. Said domestic insurance companies in all respects conducted their business substantially as the plaintiff and all other insurance companies conduct their business. There is no material distinction between domestic insurance companies and foreign insurance companies, and there is no reasonable basis upon which domestic insurance companies can be classified as separate and distinct from foreign insurance companies except upon the basis that the domestic companies are chartered to do business by the State of Oklahoma and foreign insurance companies are chartered to do business by states

other than the State of Oklahoma. By the specific terms of House Bill No. 353, domestic insurance companies are ex-[fol. 50] cepted from the provisions thereof and are not required to pay a tax of 4% or at any other rate upon the premiums collected by such companies within Oklahoma. Said House Bill No. 353 is a revenue-producing measure enacted for the specific purpose of providing general funds for the maintenance and operation of the government of the State of Oklahoma and for the purpose of providing funds for the Firemen's Relief and Pension Fund of the State of Oklahoma. Said House Bill No. 353 is not a regulatory measure enacted under and by virtue of the police power of Oklahoma, nor are the funds demanded commensurate with the expense of inspecting, investigating, or regulating the affairs of the plaintiff or of other foreign insurance companies so qualified within Oklahoma. Said House Bill No. 353, unconstitutionally and in violation of the Constitution of the United States and the various amendments thereto, discriminates between foreign and domestic corporations to the advantage of the latter and to the prejudice of the former. Said House Bill No. 353 specifically violates the provisions of the Fourteenth Amendment to the Constitution of the United States of America in that it denies to this plaintiff which is within the jurisdiction of the State of Oklahoma the equal protection of the laws, in that domestic corporations receive an exemption from an onerous tax burden which is imposed solely upon foreign insurance companies merely because they happen to be foreign instead of domestic insurance companies. Said House Bill No. 353 deprives this plaintiff of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States of America.

The provision of Section 1, Article XIX, of the Oklahoma Constitution that:

[fol. 51] "No foreign insurance company shall be granted a license and permit to do business in this State until * * * (it) shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature on foreign insurance companies"

is in violation of the Constitution of the United States in that it attempts to exact as a condition on the corporations engaging in business within the State of Oklahoma that such

foreign insurance corporations' rights secured to it by the Constitution of the United States be waived or ignored.

12

The foregoing taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma by Section 1, Chapter 1a, House Bill No. 353, Session Laws 1941, and said Act, are each unconstitutional and void for the further reason that the premium taxes are diverted by said Act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma.

13

The tax so paid under protest is illegal and the law provides no appeal from the aforesaid demands and actions of the defendant Insurance Commissioner. It is the duty of the defendants and each of them, as provided by law, to hold such taxes separate and apart from all other taxes collected until the final determination of this suit.

[fol. 52]

Second Cause of Action

In the event of a judicial determination that said House Bill No. 353 and the premium tax imposed thereby is constitutional and enforceable against this plaintiff, then and only in that event plaintiff avers:

1

Plaintiff makes a part hereof as if fully set forth at length all of the allegations of its first cause of action.

2

House Bill No. 353 became effective on April 25th, 1941. Section 10478, Oklahoma Statutes 1931, amended by said House Bill No. 353, imposed a 2% premium tax. House Bill No. 353 imposed a 4% premium tax.

3

The following table discloses the amount of gross premiums received by plaintiff, dividends to policy holders of plaintiff, and cancellations to policy holders of plaintiff within the State of Oklahoma for the periods before and

after the effective date of House Bill No. 353 during the calendar year 1941, to-wit:

[fol. 53]

	Jan. 1, 1941 to and includ- ing Apr. 24, 1941	Apr. 25, 1941, to and includ- ing Dec. 31, 1941	Entire Calendar year 1941
Total amount of gross premiums received.....	\$60,097.43	\$96,799.76	\$156,897.19
Less:			
Dividends to policy holders.....	319.18	604.62	923.80
Cancellations to policy holders.....	17,419.19	55,989.02	73,408.21
Total deductions.....	\$17,738.37	\$56,593.64	\$74,332.01
All premiums collected after deducting all cancellations and dividends to policy holders.....	\$42,359.06	\$40,206.12	\$82,565.18

4

The defendant Insurance Commissioner demanded, as set forth in plaintiff's first cause of action; that plaintiff pay a tax of 4% upon said sum of \$156,897.19, constituting the total amount of gross premiums received during the entire calendar year 1941, less the said sum of \$923.80 constituting dividends to policy holders during the entire calendar year 1941. The plaintiff paid the amount of such tax in the total [fol. 54] sum of \$6238.94 at the time, in the manner, and for the reasons as set forth in plaintiff's first cause of action.

5

The said amount of cancellations to policy holders of plaintiff during the calendar year 1941, as set forth in paragraph 3, consists of the return of premiums, including cash surrender values, paid to policy holders according to the terms and provisions of life insurance contracts, upon the surrender, return and cancellation of such contracts, and is a proper and lawful deduction from the amount of the premiums received by plaintiff in the State of Oklahoma during the calendar year 1941, in calculating the tax imposed under the provisions of either Section 10478, Oklahoma Statutes 1931, or House Bill No. 353. Plaintiff contends that the words of said statutes, exempting from the tax thereby imposed "all cancellations and dividends to policy holders" must necessarily include surrender values, return to premiums, and all considerations paid to policy holders upon the surrender, return, and cancellation of the contract of insurance.

The tax imposed by House Bill No. 353 under no circumstances could be legally and lawfully applicable to the business done by this plaintiff prior to April 25th, 1941, the effective date of said Act. Said Act as construed by the defendants and each of them is illegal, void, and unconstitutional, and results in an attempt by the defendants and each of them to take plaintiff's property without due process of law, in violation of the Constitution of the United States of America.

[fols. 55-67] Wherefore, Plaintiff prays that it have and recover judgment against the defendants, and each of them, in the amount of \$6238.94, and for the costs of this action, and for such other and further relief as may be just and proper in the premises.

Miley, Hoffman, Williams, France & Johnson, Attorneys for the plaintiff.

Filed in District Court Oklahoma County, Okla., March 8, 1943.

Cliff Myers, Court Clerk, by Edna Adams, Deputy.

(Exhibits "A" and "B" to amended petition are omitted in printing as they are duplicates of exhibits attached to original petition.)

[fol. 68] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

SECOND AMENDED PETITION—Filed August 27, 1942

Comes now The Lincoln National Life Insurance Company, a corporation, plaintiff, and leave of court being first obtained, files this, its second amended petition, herein, and respectfully avers:

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, with its principal place of business at Fort Wayne in said state, and is now and has been for many years engaged in the life insurance business. The defendant Jess G. Read is the duly elected, qualified, and acting Insurance Commissioner of the State of Oklahoma. The defendant Carl B.

Sebring is the duly elected, qualified, and acting State Treasurer of the State of Oklahoma.

[fol. 69]

First Cause of Action

Section 1, Chapter 1a, Title 36, Session Laws of Oklahoma 1941, otherwise known as House Bill No. 353 (Sec. 104, Title 36, Oklahoma Statutes 1941), effective on April 25th, 1941, provides as follows:

“Section 1. That Section 10478, Oklahoma Statutes of 1931 be and is hereby amended to read as follows:

“Every foreign insurance company, copartnership, association, inter-insurance exchange or individual who is a nonresident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted which tax, in addition to [fol. 70] an annual tax of three dollars (\$3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars (\$500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the In-

insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State.' "

2

Section 10478, Oklahoma Statutes of 1931, provides as follows:

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

3

Plaintiff on the 28th day of February, 1942, delivered to the defendant Jess G. Read, The Insurance Commissioner of the State of Oklahoma, its written report under

[fol. 72] oath according to the requirements of the statutes of Oklahoma; that said report is on file in the office of said defendant and is by reference to such record made a part hereof. Said report discloses the following transactions of plaintiff in the State of Oklahoma during the calendar year 1941, to-wit:

Total amount of gross premiums received \$156,897.19

Less:

Dividends to policy holders \$ 923.80

Cancellations to policy holders 73,408.21 74,332.01

All premiums collected after deducting all cancellations and dividends to policy holders

\$ 82,565.18

Said House Bill No. 353 provides that any company failing to pay the premium tax as provided therein shall be subject to certain forfeitures and penalties, debarred from transacting any business of insurance in the State of Oklahoma until said taxes and penalties are fully paid, and revocation of the certificate of authority granted to the agents of that company to transact business in the State of Oklahoma.

5

At the time of filing its said report, plaintiff paid to the defendant Insurance Commissioner the sum of \$3302.61, representing a premium tax of 4% upon the item of \$82,565.18 disclosed by the report of plaintiff as above set forth.

6

[fol. 73] Plaintiff received a letter under date of March 3d, 1942, from the defendant Insurance Commissioner, acknowledging receipt of plaintiff's annual statement together with attached forms, and wherein said defendant advised plaintiff as follows, to-wit:

"I do not believe that you are entitled to deduct as cancellations \$73,408.21 representing cash values paid on surrender of life insurance policies. Unless you can present convincing evidence that this deduction should be allowed your license will not be issued.

until the 4% gross premium tax is paid on said amount."

That on the 19th day of March, 1942, plaintiff paid to the defendant Insurance Commissioner the sum of \$2936.33, representing a premium tax of 4% upon the item of \$73,408.21 covering cancellations to policy holders as disclosed by the report of plaintiff above set forth.

7

The payments of the premium tax as recited in the preceding paragraphs 5 and 6 were made by plaintiff involuntarily under duress, compulsion, and pursuant to the demands of the defendant Insurance Commissioner, and to avoid the statutory forfeiture, penalties, revocation of its agents' certificate of authority, and its debarment from transacting its business in Oklahoma, and to prevent threatened deprivation and loss of its rights, interests, investments, and property within the State of Oklahoma. At the time such payments were made, plaintiff served [fol. 74] notice according to law upon each of the defendants that such payments were made under protest, receipt of which notices were acknowledged by each of said defendants, as shown by such notices of protest, copies of which, marked "Exhibit A" and "Exhibit B" are hereto attached.

8

The defendants and each of them have failed and refused to repay to plaintiff the fund so paid under protest, or any part thereof, but the amount thereof in the total sum of \$6238.94 is now held by the defendant Insurance Commissioner or is held by the defendant State Treasurer. Said funds are now and at all times subsequent to the payment thereof by plaintiff as aforesaid have been held separate and apart from all other funds or taxes collected by the defendants or either of them, and are now available to be repaid to this plaintiff in the event judgment be rendered in its favor.

9

During the month of October, 1919, the plaintiff qualified as a foreign life insurance company and was admitted to do business within the State of Oklahoma. Subsequent to

that date plaintiff has continued to do business in the State of Oklahoma and has paid an annual license fee of \$200.00 per year from 1919 to 1942, both years inclusive, as required by the Constitution and Statutes of Oklahoma. Plaintiff has paid all taxes and fees lawfully assessed or imposed by the State of Oklahoma and in all respects has complied fully with all the requirements of the statutes of Oklahoma.

10

In the conduct of its business and through the efforts [fol. 75] of its agents and representatives within the State of Oklahoma, plaintiff has obtained a large number of policy holders, built up good will and established a successful and valuable life insurance business within said state. It has assembled at great expense information and records respecting its policy holders and business within said state. A substantial part of plaintiff's assets and business within Oklahoma are in their nature personal to plaintiff, without use or value to others, and are not subject to lease or sale to others. If plaintiff were to be deprived of the privilege of doing business within the State of Oklahoma, or subjected to the illegal taxes and impositions threatened by the provisions of House Bill No. 353, and the acts and conduct of the defendants aforesaid, it would suffer irreparable loss and injury, be deprived of the equal protection of the laws and of its property without due process of law, as more fully hereinafter set forth.

11

Insurance companies incorporated and existing under and by virtue of the laws of the State of Oklahoma, being resident or domestic corporations as distinguished from foreign or non-resident corporations subject to the provisions of House Bill No. 353, have been at all times authorized to issue contracts or policies of insurance identical in effect with those issued by this plaintiff. Said domestic insurance companies in all respects conducted their business substantially as the plaintiff and all other insurance companies conduct their business. There is no material distinction between domestic insurance companies and foreign insurance companies and there is no reasonable basis upon which domestic insurance companies can be classified as separate and distinct from foreign insurance companies.

except upon the basis that the domestic companies are chartered to do business by the State of Oklahoma and foreign insurance companies are chartered to do business by states other than the State of Oklahoma. By the specific terms of House Bill No. 353, domestic insurance companies are excepted from the provisions thereof and are not required to pay a tax of 4% or at any other rate upon the premiums collected by such companies within Oklahoma. Said House Bill No. 353 is a revenue-producing measure enacted for the specific purpose of providing general funds for the maintenance and operation of the government of the State of Oklahoma and for the purpose of providing funds for the Firemen's Relief and Pension Fund of the State of Oklahoma. Said House Bill No. 353 is not a regulatory measure enacted under and by virtue of the police power of Oklahoma, nor are the funds demanded commensurate with the expense of inspecting, investigating, or regulating the affairs of the plaintiff or of other foreign insurance companies so qualified within Oklahoma. Said House Bill No. 353, unconstitutionally and in violation of the Constitution of the United States and the various amendments thereto, discriminates between foreign and domestic corporations to the advantage of the latter and to the prejudice of the former. Said House Bill No. 353 specifically violates the provisions of the Fourteenth Amendment to the Constitution of the United States of America, in that it denies to this plaintiff which is within the jurisdiction of the State of Oklahoma the equal protection of the laws, in that domestic corporations receive an exemption from an onerous tax burden which is imposed solely upon foreign insurance companies merely because they happen to be foreign instead of domestic insurance companies. Said House Bill No. 353 deprives this plaintiff of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America.

The provision of Section 1, Article XIX of the Oklahoma Constitution that:

"No foreign insurance company shall be granted a license and permit to do business in this State until . . . (it) shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature on foreign insurance companies"

is in violation of the Constitution of the United States in that it attempts to exact as a condition on the corporations engaging in business within the State of Oklahoma that such foreign insurance corporation's rights secured to it by the Constitution of the United States be waived or ignored.

12

The foregoing taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma by Section 1, Chapter 1a, House Bill No. 353, Session Laws 1941, and said Act, are each unconstitutional and void for the further reason that the premium taxes are diverted by said Act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma.

13

The tax so paid under protest is illegal and the law provides no appeal from the aforesaid demands and actions of the defendant Insurance Commissioner. It is the duty of the defendants and each of them, as provided by law, to hold such taxes separate and apart from all other taxes collected until the final determination of this suit.

Second Cause of Action

In the event of a judicial determination that said House Bill No. 353 is constitutional, or that the premium tax imposed by either the said House Bill No. 353 or Section 10478, Oklahoma Statutes 1931, is enforceable against this plaintiff, then and only in that event plaintiff avers:

1

Plaintiff makes a part hereof as if fully set forth at length all of the allegations of its first cause of action.

2

The amount of cancellations to policy holders of plaintiff during the calendar year 1941, as set forth in paragraphs 3 and 6 of plaintiff's first cause of action, consists of the return of premiums, including cash surrender values, paid to policy holders according to the terms and provisions of life insurance contracts, upon the surrender, return, and cancellation of such contracts, and is a proper and lawful [fol. 79] deduction from the amount of the premiums re-

ceived by plaintiff in the State of Oklahoma, during the calendar year 1941, in calculating the tax imposed under the provisions of either Section 10478, Oklahoma Statutes 1931, or House Bill No. 353. Plaintiff contends that the words of said statutes, exempting from the tax thereby imposed "all cancellations and dividends to policy holders" must necessarily include surrender values, return of premiums, and all considerations paid to policy holders upon the surrender, return, and cancellation of the contract of insurance.

Third Cause of Action

In the event of a judicial determination that said House Bill No. 353 and the premium tax imposed thereby is constitutional and enforceable against this plaintiff, then and only in that event plaintiff avers:

1

Plaintiff makes a part hereof as if fully set forth at length all of the allegations of its first cause of action.

2

House Bill No. 353 became effective on April 25th, 1941. Section 10478, Oklahoma Statutes 1931, amended by said House Bill No. 353, imposed a 2% premium tax. House Bill No. 353 imposes a 4% premium tax.

3

The following table discloses the amount of gross premiums received by plaintiff, dividends to policy holders of [fol. 80] plaintiff, and cancellations to policy holders of plaintiff within the State of Oklahoma for the periods before and after the effective date of House Bill No. 353 during the calendar year 1941, to-wit:

	Jan. 1, 1941 to and includ- ing Apr. 24, 1941	Apr. 24, 1941, to and includ- ing Dec. 31, 1941	Entire Calendar year 1941
Total amount of gross premiums received	\$60,097.43	\$96,799.76	\$156,897.19
Less:			
Dividends to policy holders	\$19.18	604.62	923.80
Cancellations to policy holders	17,419.19	55,989.02	73,408.21
Total deductions	\$17,738.37	\$56,593.64	\$74,332.01
All premiums collected after deducting all cancellations and dividends to policy holders	\$42,359.06	\$40,206.12	\$82,565.18

[fol. 81]

4

The defendant Insurance Commissioner demanded, as set forth in plaintiff's first cause of action, that plaintiff pay a tax of 4% upon said sum of \$156,897.19, constituting the total amount of gross premiums received during the entire calendar year 1941, less the said sum of \$933.80 constituting dividends to policy holders during the entire calendar year 1941. The plaintiff paid the amount of such tax in the total sum of \$6238.94 at the time, in the manner, and for the reasons as set forth in plaintiff's first cause of action.

5

The tax imposed by House Bill No. 353 under no circumstances could be legally and lawfully applicable to the business done by this plaintiff prior to April 25th, 1941, the effective date of said Act. Said Act as construed by the defendants and each of them is illegal, void, and unconstitutional, and results in an attempt by the defendants and each of them to take plaintiff's property without due process of law, in violation of the Constitution of the United States of America.

Wherefore, plaintiff prays that it have and recover judgment against the defendants, and each of them, in the amount of \$6238.94, and for the costs of this action, and for such other and further relief as may be just and proper in the premises.

Miley, Hoffman, Williams, France & Johnson, Attorneys for the Plaintiff.

[fols. 82-91] ORDER GRANTING LEAVE TO FILE

Leave is hereby granted to file the above and foregoing Second Amended Petition this 27 day of August, 1942.

Albert C. Hunt, District Judge.

(Exhibits "A" and "B" to second amended petition are omitted in printing as they are duplicates of exhibits attached to original petition.)

[fol. 92] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

DEMURRER—Filed August 29, 1942

Coming Now the above named defendants and demur to the *Second Amended Petition* of plaintiff herein, and for ground of objection state:

(1) That this Court has no jurisdiction of the subject of the action;

(2) That this action is in reality a suit against the State of Oklahoma and hence cannot be maintained for the reason that there is no legislative enactment authorizing the State to be sued; and

[fols. 93-95] (3) That the Petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants.

(Signed:) Mac Q. Williamson, Attorney General,
Fred Hansen, Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 96] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

No. 105,488.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff,

vs.

JESS G. READ, The Insurance Commissioner of the State of Oklahoma; and CARL B. SEBRING, State Treasurer of the State of Oklahoma, Defendants

JOURNAL ENTRY OF JUDGMENT—Filed September 14, 1942

Now on this, the 8th day of September, 1942, the above cause came on for hearing upon defendants' demurrer to the second amended petition of plaintiff, both parties being

present by their respective attorneys of record; and the Court having examined the pleadings and having heard the argument of Counsel, asked both parties to file briefs, and took the case under advisement.

Now on this, the 11th day of September, 1942, said briefs having been filed and considered, this cause came on for decision upon said demurrer, the parties appearing, as [fol. 97] aforesaid, and the Court being fully advised in the premises, and in consideration thereof, finds that neither Section 2, Article 19 of the Constitution of Oklahoma, Section 10478, Oklahoma Statutes 1931, or House Bill No. 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition, violate the 14th Amendment of the Constitution of the United States or the Constitution of Oklahoma, and that neither said petition nor the 1st, 2nd or 3rd causes of action thereof state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants, or either of them, and that hence defendants' demurrer to said petition and to each of its said causes of action, should be sustained.

The Court further finds, in relation to said *First cause of action*, that under the pertinent constitutional and statutory provisions of this State, as construed in the case of *New York Life Insurance Company v. Board of Commissioners of Oklahoma County*, 155 Okl. 247, 9 Pac. (2d) 636, and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice:

2. (a) when a foreign insurance company desires, for the [fol. 98] first time, to enter Oklahoma and to do business therein, it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so

entering Oklahoma and doing business therein to and including said last day of February, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date, and

(b) when such a licensed company desires to enter Oklahoma and do business therein during the ensuing license year (March 1 to and including the succeeding last day of February), it is required, among other things, to file on or before the last of February of the current license year, an application for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show payment of a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year, and to pay, on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do business therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said Company expires by operation of law and its express terms at the end of said year.

The Court also finds, in relation to said ~~second~~ *cause of action*, that under the pertinent constitutional and statutory provisions of this State and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the words "after all cancellations are deducted" as used in Section 2, Article 19, of the Constitution of Oklahoma, and the words "after all cancellations and dividends to policyholders are deducted," as used in Section 10478, Oklahoma Statutes 1931, and Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign

life insurance companies in this State to their Oklahoma policyholders.

The Court further finds, in relation to said *third cause of action*, that under the express provisions of Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, and the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of said Act, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the annual four per cent tax on premiums referred to in said section is levied and should be collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceeding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies after said date.

It is Therefore Ordered, Adjudged and Decreed by the Court that defendants' demurrer to plaintiff's second amended petition in the above cause be and the same is hereby sustained, to which findings and order plaintiff [fol. 101] excepted, which exceptions are duly allowed. Thereupon, plaintiff announced in open court its intention to stand upon its said petition and to refuse to plead further.

It is Therefore Ordered, Adjudged and Decreed by the Court that the above case be dismissed at the cost of plaintiff to which ruling and judgment of the Court plaintiff excepted, and its exceptions are duly allowed.

Thereupon, in open court, plaintiff gave notice of its intention to appeal to the Supreme Court of the State of Oklahoma, and, upon application of plaintiff and for good cause shown, it is ordered and adjudged by the Court that plaintiff be granted 30 days' time in addition to the time allowed by law to make and serve case-made on appeal to the Supreme Court of Oklahoma in said cause, defendants to have three (3) days thereafter in which to suggest amendments, the case-made to be signed and settled upon three (3) days' notice by either party.

Approved as to Form:

(Signed) Miley, Hoffman, Williams, Francee & Johnson, Atty. for Plaintiff. (Signed) Fred Hansen, Asst. Atty. Gen., Atty. for Defendants. (Signed) Lucius Babcock, District Judge.

[fol. 118] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

ORDER OF REVIVOR--Filed March 4, 1943

Now on this 4th day of Mar., 1943, the motion for revivor of the plaintiff and A. S. J. Shaw, State Treasurer of Oklahoma, comes on for hearing; and the Court, being fully advised in the premises, finds that subsequent to the order and judgment of this Court entered herein on the 11th day of September, 1942, the defendant Carl B. Sebring, State Treasurer of the State of Oklahoma, has been succeeded in said office by A. S. J. Shaw; that A. S. J. Shaw is now the duly elected, qualified and acting State Treasurer of the State of Oklahoma, and that said motion should be sustained.

[fol. 119] It is Therefore Ordered and Adjudged that the action of the plaintiff against the defendant Carl B. Sebring, State Treasurer of the State of Oklahoma, be revived against his successor in office, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and that A. S. J. Shaw, State Treasurer of the State of Oklahoma, be, and he is hereby made a party to the said order and judgment in the place and stead of Carl B. Sebring, State Treasurer of the State of Oklahoma, in the manner and to the same extent as though originally a party defendant herein, and all further proceedings herein be in the name of A. S. J. Shaw, State Treasurer of the State of Oklahoma.

O. K.:

(Signed) Miley, Hoffman, Williams, France & Johnson, Attorneys for the Plaintiff.

O. K.:

(Signed) Mac Q. Williamson, Atty. Gen. of Okla. Fred Hansen, Asst. Atty. Gen. Attorney for the Defendants Jess G. Read, The Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma.

(Signed) Lucius Babcock, Judge of the District Court in and for Oklahoma County, Oklahoma.

[fols. 120-128] [File endorsement omitted.]

[fol. 128a]

[File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

vs.

JESS G. READ, The Insurance Commissioner of the State of Oklahoma; and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error

No. 51338

PETITION IN ERROR—Filed March 8, 1943

Said plaintiff in error, The Lincoln National Life Insurance Company, a corporation, complains of said defendants in error, Jess G. Read, The Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, for the reason that on the 11th day of September, 1942, in an action then pending in the District Court of the State of Oklahoma in and for Oklahoma County, wherein the said plaintiff in error was plaintiff, and said Jess G. Read, The Insurance Commissioner of the State of Oklahoma, defendant in error, and Carl B. Sebring, State Treasurer of the State of Oklahoma, were defendants, said Court rendered an order sustaining said defendants' demurrer to plaintiff's second amended petition in said cause, and a judgment dismissing said case. A. S. J. Shaw, State Treasurer of the State of Oklahoma, is named as defendant in error herein, in the place and stead of said defendant Carl B. Sebring, State Treasurer of the State of Oklahoma, according to the order of revivor entered by said Court.

[fol. 128b] The original case made, duly signed, attested, and filed, and a certified transcript of the record of said Court, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

The plaintiff in error, The Lincoln National Life Insurance Company, a corporation, avers that there is error in the said record, and proceedings in this, to-wit:

1. Said Court erred in sustaining the demurrer of said defendants to the second amended petition of plaintiff in error.

2. Said Court erred in sustaining the demurrer of said defendants to the first cause of action contained in the second amended petition of plaintiff in error.

3. Said Court erred in sustaining the demurrer of said defendants to the second cause of action contained in the second amended petition of plaintiff in error.

4. Said Court erred in sustaining the demurrer of said defendants to the third cause of action contained in the second amended petition of plaintiff in error.

5. Said Court erred rendering the findings contained in said order and judgment.

6. Said Court erred in finding that Section 2, Article 19, of the Constitution of Oklahoma does not violate the Fourteenth Amendment of the Constitution of the United States.

7. Said Court erred in finding that Section 10478, Oklahoma Statutes of 1931, does not violate the Fourteenth Amendment of the Constitution of the United States.

[fol. 128c] 8. Said Court erred in finding that Section 10478, Oklahoma Statutes of 1931, does not violate the Constitution of Oklahoma.

9. Said Court erred in finding that House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Tit. 36, p. 121, Oklahoma Session Laws, 1941) does not violate the Fourteenth Amendment of the Constitution of the United States.

10. Said Court erred in finding that House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Tit. 36, p. 121, Oklahoma Session Laws, 1941) does not violate the Constitution of Oklahoma.

11. Said Court erred in finding that the Construction or application of Section 2, Article 19, Constitution of Oklahoma; Section 10478, Oklahoma Statutes 1931; or House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Tit. 36, p. 121, Oklahoma Session Law, 1941) by the Insurance Commissioner of Oklahoma, referred to in plaintiff's second amended petition, does not violate the Fourteenth Amendment of the Constitution of the United States.

12. Said Court erred in finding that the construction or application of Section 2, Article 19, Constitution of Okla-

homa; Section 10478, Oklahoma Statutes 1931; or House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Titl. 36, p. 121, Oklahoma Session Laws, 1941) by the Insurance Commissioner of Oklahoma, referred to in plaintiff's second amended petition, does not violate the Constitution of Oklahoma.

[fol. 128d] 13. Said Court erred in its findings contained in said order and judgment of September 11th, 1942, in relation to the first cause of action contained in the second amended petition of plaintiff in error.

14. Said Court erred in its findings contained in said order and judgment of September 11th, 1942, in relation to the administrative practices of the State Insurance Commissioner.

15. Said Court erred in finding that such administrative practices of the State Insurance Commissioner are a matter of common knowledge.

16. Said Court erred in taking judicial notice of such administrative practices of the State Insurance Commissioner.

17. Said Court erred in its findings contained in said order and judgment of September 11th, 1942, in relation to the second cause of action contained in the second amended petition of plaintiff in error.

18. Said Court erred in finding in said order and judgment of September 11th, 1942, that the words "after all cancellations are deducted" as used in Section 2, Article 19 of the Constitution of Oklahoma, and the words "after all cancellations and dividends to policyholders are deducted," as used in Section 10478, Oklahoma Statutes 1931, and Section, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign life insurance companies in this State to their Oklahoma policyholders.

[fol. 128e] 19. Said Court erred in its findings contained in said order and judgment of September 11th, 1942, in relation to the third cause of action contained in the second amended petition of plaintiff in error.

20. Said Court erred in finding in said order and judgment of September 11th, 1942, that the annual 4% tax on premiums referred to in Section 1, Chapter 1a, Title 36,

page 121, Oklahoma Session Laws 1941, is levied and should be collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the 12 months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies after said date.

21. Said Court erred in rendering judgment that said case be dismissed.

22. Said Court erred in rendering the judgment and decree of September 11th, 1942, entered in favor of said defendants and against said plaintiff in error.

Wherefore, plaintiff in error prays that said order and judgment, and each of them, so rendered on September 11th, 1942, be reversed, set aside, and held for naught, and that plaintiff in error be restored to all right that it has lost by the rendition of said order and judgment; that the demurrer of defendants in error to the second amended petition of plaintiff in error be overruled; and for such other and further relief as to the Court may seem just.

Miley, Hoffman, Williams, France & Johnson, Attorneys for Plaintiff in Error.

[fol. 129]

[File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

BRIEF OF PLAINTIFF IN ERROR—Filed July 12, 1943

Statement of Case

The Lincoln Nation National Life Insurance Company, plaintiff in error here and plaintiff below, and Jess G. Read, Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, defendants in error here and defendants below, will be referred to herein respectively as the Insurance Company, Insurance Commissioner, and State Treasurer, or as plaintiff and defendants as they appeared below.

[fol. 130] 3. The laws of Oklahoma imposing a tax of 4% upon premiums collected by foreign insurance companies

discriminate between foreign and domestic insurance corporations to the advantage of the latter and to the prejudice of the former. Although it is considered as admitted upon the demurrer that the 4% tax is a heavy discrimination against foreign insurance companies, we believe it not amiss to add for the information of the Court a statement to which we understand the defendants will readily agree, viz: That the tax of 4% of all premiums, less proper deductions, collected by the plaintiff insurance company in the State of Oklahoma, is not collected on like premiums of competing domestic insurance companies, and the only tax collected from said latter companies not collected from the plaintiff insurance company is a state income tax amounting to approximately one-twentieth of said 4% tax.

[fol. 131]

[File endowment omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

BRIEF OF DEFENDANTS IN ERROR—Filed August 16, 1943

Statement of Case

However, in order that the Court may not misunderstand defendants' conception of the discriminatory character of the premium tax involved here, both before and after it was increased in 1941 from two per cent to four per cent, we desire to state that we fully agree with plaintiff's statements on page 18 of its brief (same being in relation to matters of common knowledge in which the Court may take judicial notice) that

[fols. 132-133] "the tax of 4% of all premiums, less proper deductions, collected by the plaintiff insurance company in the State of Oklahoma, is not collected on like premiums of competing domestic insurance companies and the only tax collected from said latter companies not collected from the plaintiff insurance company is a state income tax amount to approximately

one-twentieth of said 4% tax (or one-tenth of said 2% tax)."

and

"The expenses of the State Insurance Department since statehood until December 31st, 1941, have been approximately 3.55% of the amount collected from the former 2% premium tax and other receipts, and since said latter date said expenses have been approximately 2% of the amount collected from the present 4% premium tax and other receipts."

While this action only involves \$6,238.94, the principles of law announced by this Court in its decision herein will effect the validity of Annual Taxes on the Oklahoma premiums of foreign insurance companies doing business in this State of Approximately \$2,160,000.00.

[fols. 134-157] IN SUPREME COURT OF OKLAHOMA

No. 31338

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff in Error

vs.

JESS G. READ, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error.

OPINION—Filed April 18, 1944

(All of opinion except last three paragraphs is omitted in printing. Omitted portion is contained in opinion filed Nov. 21, 1944, side folios 182-203 post.)
[fols. 158-165] The petition alleged collection of premiums in 1941 before April 25th in the total amount of \$60,097.43, and alleged dividends paid to policyholders during that time in the sum of \$319.18, leaving \$59,778.25 taxable under the law when collected at the rate of 2%, and no more. Therefore, plaintiff's petition as to the third cause of action stated facts sufficient to constitute a cause of action for the recovery of \$1,195.57, but no more.

The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.

The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed and the cause remanded with directions to overrule the demurrer as to the third cause of action.

Concur: Corn, C.J., and Osborn, Bayless, Welch, Hurst, Davison and Arnold, JJ.

Dissent: Gibson, VCJ.

{fol. 166]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed May 18, 1944

Comes now The Lincoln National Life Insurance Company, plaintiff in error, and respectfully represents to the Court that on the 18th day of April, 1944, a decree and judgment was rendered by this Court in said cause. We quote the concluding two paragraphs of the Court's decision, to-wit:

"The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.

"The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed and the cause remanded, with directions to overrule the demurrer as to the third cause of action."

[fol. 167] Lincoln Nat'l Life Ins. Co. v. Read Et Al.

The first cause of action draws in question the validity of the 4% insurance premium tax statute of Oklahoma, on the ground of its being repugnant to the Constitution of the United States (C-M. 61-70).

The second cause of action is alleged in the event, and only in the event, of a judicial determination that the said 4% insurance premium tax statute is constitutional, or that either the 4% tax or the former 2% tax is enforceable (C-M. 70-71). It involves the contention that cash values paid to policyholders upon the surrender and cancellation of policies of life insurance are included in the deduction of "all cancellations" provided in the tax law in question.

The third cause of action is alleged in the event, and only in the event, of a judicial determination that said 4% insurance premium tax statute is constitutional (C-M. 71-73). It involves the contention that the increase of the tax from 2% to 4% should not operate as to premium income received prior to the effective date of the Act. The Court sustained this contention.

The demurrer goes to the petition as a whole. Defendants did not demur separately to each cause of action (C-M. 84-85).

Plaintiff in error makes a part hereof the brief hereto attached from which it is shown:

1. The decision of this Court, erroneously and contrary to the guaranties embodied in the Federal Constitution and the fundamental principles announced in decisions of the Supreme Court of the United States, upholds the imposition of a tax that admittedly discriminates against foreign insurance companies,

[fol. 168-176] Petition for Rehearing and Brief in Support

2. The decision of this Court erroneously holds that the payment of cash surrender values as provided for in life insurance policies is not a cancellation within the terms or within the meaning of the Constitution and statutes.

3. This Court apparently overlooks the fact that the demurrer is general to the entire petition. In view of the Court's holding that the petition as to the third cause of action is sufficient, the petition is good as against said general demurrer, and the order of the trial court sustaining the demurrer and the judgment dismissing the petition should be reversed.

Wherefore, plaintiff in error prays that a rehearing of said cause be granted.

Miley, Hoffman, Williams, France & Johnson, 10309
First National Building, Oklahoma City, Oklahoma,
Attorneys for Plaintiff in Error.

[fols. 177-178] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—Filed September 12, 1944

The clerk is hereby directed to enter the following orders:

September 12, 1944.

31338—The Lincoln National Life Ins. Co. v. Read, Ins. Comr. et al. Petition for rehearing denied.

N. S. Corn,

Chief Justice.

[fol. 179]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JOINT MOTION AND STIPULATION—Filed November 14, 1944

Come now the plaintiff in error and defendants in error, as named in the above caption, and joining in this motion allege and state that the judgment and decision of this Court concludes as follows, to-wit:

“The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.

“The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed and the cause remanded, with directions to overrule the demurrer as to the third cause of action.”

The parties further show that the petition for rehearing filed herein was denied by this Court on the 12th day of September, 1944; that the mandate of this Court has not issued, having been stayed by order of this Court heretofore entered herein.

[fol. 180] The parties further show that there exists no issue as to the facts set out in the petition of plaintiff in error, but that the facts therein stated are true and correct

and there is nothing to be gained by proceeding with the trial of this cause in the District Court of Oklahoma County, Oklahoma.

The parties further agree that the said third cause of action set out in the petition of plaintiff in error is alleged only in the event it be judicially determined that the premium tax law involved herein is constitutional, and the amount of the tax involved in said third cause of action and which plaintiff in error seeks to recover in such event is the sum of \$847.18.

The parties further show that it is to the interest of all the parties hereto, and to the public interest, to effect a speedy and economical determination of this action.

Wherefore, the parties pray that this Court recall its judgment herein and completely determine and adjudicate this action, including the respective liability of the parties for costs.

Miley, Hoffman, France & Johnson, Attorneys for the
 "Lincoln National Life Insurance Company, Plaintiff in Error. Fred Hansen, Assistant Attorney General; Attorney for Jess G. Read, the Insurance Commissioner of the State of Oklahoma and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error.

[fol. 181]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER WITHDRAWING OPINION—Filed November 20, 1944

The joint motion and stipulation of the parties herein having been heard and considered,

It is ordered that the opinion and decision of this Court entered and filed herein on the 18th day of April, 1944, and all orders of this Court thereafter entered and filed herein, be, and the same are hereby withdrawn and this cause is submitted for further consideration by this Court.

Dated this 20 day of November, 1944.

N. S. Corn, Chief Justice.

[fol. 182]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 31338

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

vs.

JESS G. READ, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error

SYLLABUS

1. A state may, subject to paramount authority of the Federal Constitution, withhold from foreign corporations the privilege of doing business within the state, or grant such privilege on such conditions as the state may deem fit, provided such conditions do not require the surrender of rights guaranteed by the Federal Constitution.

2. A state may exact a gross premium tax from foreign insurance companies for the privilege of doing business within the state.

3. It is not an essential of a privilege tax exacted by a state from a foreign corporation for the privilege of doing business within the state that it be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege.

4. The long-continued construction of a statute by department of government charged with its execution is entitled to great weight and should not be overturned without cogent reasons. *Great Northern Life Insurance Company v. Read, Insurance Commissioner of Oklahoma*, 136 Fed. 2d 44.

[fol. 183] 5. Payment of gross premium tax by foreign insurance companies on or before the expiration of the license year is exacted for the privilege of doing business within the State of Oklahoma during that license year and a showing that such tax has been paid is a condition precedent for the issuance of a license for the ensuing year.

6. It was within the power of the State of Oklahoma to change the requirements for the privilege of a foreign insurance company to do business within the State by increasing the rate of gross premium tax exacted for such privilege during the license year as to premiums collected after the effective date of the Act increasing the tax.

7. Imposition of gross premium tax on foreign insurance companies for the privilege of doing business within the State as provided by Sections 1 and 2 of Article 19 of the Constitution of the State of Oklahoma and Section 10478, O. S. 1931, and 36 O. S. 1941, Section 104, does not violate the 14th Amendment of the Federal Constitution, though no like tax is exacted from domestic insurance companies.

8. An insurance company's payment of cash surrender value of life insurance policies to the holders thereof and their surrender of the policies to the company does not effect cancellation of the policies within the meaning of Section 2, Article 19, of the Constitution and the statutes of Oklahoma requiring payment of a tax on all premiums collected in the State, "after all cancellations are deducted."

9. Statutes are to be construed as having a prospective operation unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt the doubt must be resolved against the retrospective effect. *Good et al. v. Keel et al.*, 29 Okla. 325, 116 Pac. 777.

10. 36 O. S. 1941, Section 104, by which the rate of the gross premium tax on foreign insurance companies was increased from 2% to 4%, effective April 25, 1941, was not specifically, nor by necessary implication, retroactive so as to apply the increased tax to the premiums collected in the year 1941, prior to the 25th day of April of that year.

[fol. 184] APPEAL FROM THE DISTRICT COURT OF OKLAHOMA
COUNTY

Honorable Lucius Babcock, Judge

Affirmed in Part and Reversed in Part

MILEY, HOFFMAN, WILLIAMS, FRANCE & JOHNSON, Oklahoma
City, for Plaintiff in Error

MAC Q. WILLIAMSON, Attorney General, FRED HANSEN, As-
sistant Attorney General, and Andy Crosby, Jr., Okla-
homa City, for Defendants in Error

OPINION—Filed November 21, 1944

RILEY, J.:

The Lincoln National Life Insurance Company is a corporation, organized under the laws of the State of Indiana, and is engaged in the life insurance business. Honorable Jess G. Read is the duly elected Insurance Commissioner of the State of Oklahoma.

On March 27, 1942, the Lincoln National Life Insurance Company, hereinafter referred to as plaintiff, commenced this action against Jess G. Read, Insurance Commissioner, and Carl B. Sebring, the then State Treasurer, hereinafter referred to as defendants, to recover the sum of \$6,238.94 theretofore paid by plaintiff as the 4% premium or license tax, under the provisions of Sections 1 and 2, Article 19, of the Constitution of the State of Oklahoma, and Section 10478, O. S. 1931, as amended by Title 36, Chapter 1a, Session Laws 1941 (36 O. S. 1941, Section 104), and also referred to in the record as House Bill No. 353.

After the judgment herein reviewed was rendered, Honorable A. S. J. Shaw, who had in the meantime become State Treasurer, was substituted for Carl B. Sebring, State Treasurer, as party defendant. Plaintiff paid the license tax (or a part thereof) under protest, and brought this action to recover the entire amount of the taxes so paid. [fol. 185] Defendants' demurrer to plaintiff's second amended petition, consisting of three alleged causes of action, was sustained. Plaintiff elected to stand on the petition as amended, whereupon the court entered judgment dismissing the cause. Plaintiff appeals.

The first cause of action assails the validity of the annual tax of 2% on all premiums collected by plaintiff in the State under the provisions of Sections 1 and 2, Article 19, of the Constitution and Section 10478, O. S. 1931. A tax of 4% on such premiums was provided by Section 1, Chapter 1a, Title 36, Session Laws 1941 (36 O. S. 1941, Section 104), House Bill No. 353, *supra*, amendatory of Section 10478, effective April 25, 1941. These provisions of statute were construed by the State Insurance Commissioner and deemed applicable to the premiums collected by plaintiff in this State during the entire year of 1941.

Plaintiff alleges that the provisions of Sections 1 and 2, Article 19, of the Constitution of Oklahoma, and the statutory provisions, as construed and applied by the Insurance Commissioner, unlawfully discriminate against plaintiff and in favor of life insurance companies organized under the laws of the State of Oklahoma which are not required to pay a gross premium tax, or any other similar tax. Thereby it is alleged that there is violation of the 14th Amendment of the Constitution of the United States, and that plaintiff is deprived of equal protection of the law.

The second cause of action assails that part of the tax (if any other part thereof is valid) which was claimed by the State Insurance Commissioner and paid by plaintiff which represents 4% on \$73,408.21 of plaintiff's premium collections, which plaintiff claims should have been deducted on account of cash surrender values paid to policyholders [fol. 186] upon surrender, return, and cancellation of policy contracts.

The third cause of action assails that part of the tax represented by the increase of the rate from 2% to 4% on premiums collected by plaintiff during the year 1941, and prior to April 25, 1941, the effective date of the Act amending Section 10478, *supra*.

Defendants' demurrer to the petition as amended is upon three grounds: (1) Want of jurisdiction in the court of the subject matter of the action; (2) that the suit is one against the State and that there is no legislative authority or grant of the right to sue the State; and (3) that the petition as amended does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant. The court sustained the demurrer upon the third ground. It is not contended here that either the first or second ground of the demurrer is well taken.

Section 1, Article 19, of the Constitution of the State of Oklahoma, provides:

"No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

Section 2 of Article 19 provides:

"Until otherwise provided by law, all foreign insurance companies . . . shall pay to the Insurance Commissioner for the use of the State an entrance fee as follows:

"Each foreign Life Insurance Company, per annum, two hundred dollars; . . .

"Until otherwise provided by law, domestic companies excepted, each insurance company, including [fol. 187] surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

Section 10478, O. S. 1931 (first adopted in 1909), prior to 1941 amendment, provided:

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State.

after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

Said section, as amended in 1941, is substantially the same except the rate of the premium tax is 4% instead of 2%.

36 O. S. 1941, Section 56, provides that the Insurance Commissioner shall furnish each insurance company authorized to do business in the State blank forms upon which to make annual reports, and that such companies shall annually, on or before the last day of February, file with the Insurance Commissioner a statement under oath showing their financial condition as of December 31st of the previous year and:

[Vol. 188] if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this State, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue.

The trial court in sustaining the demurrer held:

. that neither Section 2, Article 19 of the Constitution of Oklahoma, Section 10478, Oklahoma

Statutes, 1931, or House Bill 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition, violate the 14th Amendment of the Constitution of the United States or the Constitution of Oklahoma, and that neither said petition nor the 1st, 2nd or 3rd causes of action thereof state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants, or either of them, and that hence defendants' demurrer to said petition and to each of its said causes of action should be sustained. * * *

With reference to the first cause of action, the trial court held:

“ * * * Under the pertinent constitutional and statutory provisions of this State, as construed in the case of *New York Life Insurance Company v. Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 636, and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice:

“(A) When a foreign insurance company desires, for the first time, to enter Oklahoma and to do business therein, it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so entering Oklahoma and doing business therein to and [fol. 189] including said last day of February, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date, and

“(b) when such a licensed company desires to enter Oklahoma and do business therein during the ensuing

license year (March 1 to including the succeeding last day of February), it is required, among other things, to file on or before the last day of February of the current license year, an application for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show payment of a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year, and to pay, on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do business therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms at the end of said year."

As to the second cause of action, the court held:

"... that under the pertinent constitutional and statutory provisions of this State and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the words 'after all cancellations are deducted' as used in Section 2, Article 19, of the Constitution of Oklahoma, and the words 'after all cancellations and dividends to policyholders are deducted,' as used in Section 10478, Oklahoma Statutes 1931, and Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign life insurance companies in this State to their Oklahoma policyholders."

With reference to the third cause of action, the court held:

“ . . . that under the express provisions of Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, and the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of said Act, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the annual four per cent tax on premiums referred to in said section is levied and should be corrected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, ‘within the twelve months next preceding the first day of January,’ 1942, as well as on all premiums, less proper deductions, received by said companies after said date.”

It has been the uniform administrative practice of the Insurance Commissioner, since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires, for the first time, to do business in Oklahoma to require it, among other things, to file an application for a license to expire on the last day of February next after its issue, and, on or before such date, to pay the gross premium tax imposed by law on all premiums, less proper deductions, received by it in Oklahoma from the date of the issuance of its license to and including the first day of December next; and when a foreign insurance company holding a license to do business in Oklahoma during any license year desires to do business therein during the ensuing license year, to require it, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license for the ensuing year; (b) to pay the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year, as a condition precedent to the issuance of the license for the ensuing year; and (c) to pay, on or before the last day of February of the ensuing license year the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year; and since the effective date of such Act the Insurance Commissioner has uniformly interpreted such Act as providing for a license, to expire on the last

[fol. 191] day of February next after its issuance; and in issuing renewal licenses has uniformly construed it as requiring the payment, on or before the last day of February in each year, of the gross premium tax for the right or privilege of entering Oklahoma and doing business therein during the license year expiring on that date.

Under the law licenses issued to foreign insurance companies expire on the last day of February next after the date of their issuance. If the construction and interpretation by the administrative officer and the court of the constitutional and statutory provisions quoted above is permissible, there is no invalidity in the gross premium tax therein provided.

It is well settled that a state may withhold from a foreign corporation the privilege of doing business within its borders entirely. It may grant such privilege or authority on such conditions as it may deem fit. *Williams v. Standard Oil Company of Louisiana*, 278 U. S. 235, 73 L. ed. 287; *Hanover Fire Insurance Company v. Carr, Treasurer*, 272 U. S. 494, 71 L. ed. 372. These general rules are subject to a well-settled qualification that a state may not impose conditions which require the surrender of rights guaranteed by the Federal Constitution. The power of a state to exact a gross premium tax from a foreign insurance company for the privilege of doing business within the state is likewise well settled. *Philadelphia Fire Association v. New York*, 119 U. S. 100, 30 L. ed. 342.

It is the contention of plaintiff that because the gross premium tax involved is not payable and could not be computed or collected until the close of the year 1941, it cannot be held as a valid tax for the privilege of doing business [fol. 192] in the state during that year.

It is not essential that a privilege tax be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege, depending upon which system the Legislature chooses to adopt. *Carpenter, Insurance Commissioner v. Peoples Mutual Insurance Company (Calif.)*, 74 Pac. 2d 508; *William A. Slater Mills, Inc. v. Gilpatric, State Treasurer*, 117 Atl. 806; *Pacific Mutual Life Insurance Company v. Hobbs, Commissioner of Insurance (Kan.)*, 103 Pac. 2d 854.

In the latter case it was held:

"1. The statute requiring foreign insurance companies, at the time of making annual statements re-

quired by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, imposes taxes, payable at the end of the year, for the privilege of doing business in the state."

3. The tax on gross premiums received by foreign insurance companies for business done in the state is an 'excise tax' in the nature of a franchise or privilege tax on the privilege of doing business, and partakes of the nature of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of certificates of authority of such companies."

In the body of the opinion it is stated:

"The tax is an excise tax. The company was given the privilege of doing business in the state. Upon what basis is the tax to be imposed? Obviously upon the volume of business done during the previous year. On the 1st day of January or within sixty days thereafter, the company is required to make a return showing the business done during the previous year. The tax is on the privilege of doing business in the state,—the tax is fixed at a percentage of premiums received during the preceding year. The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient."

Sections 1 and 2, Article 19, of the Constitution, together with the statutory provisions above quoted, permit the construction that the payment of a gross premium tax on or before the expiration of the license year for the privilege of doing business in the State during the license year is a condition precedent to the issuance of a license for the ensuing year. This has been the uniform construction and application of the law by the executive department of the State charged with the administration of the law. It was in effect so held by the trial court. See, also, *Great Northern Life Insurance Company*, a corporation, *v.* Jess G. Read, Insurance Commissioner for the State of Oklahoma, 136 Fed. 2d 44 (pending on proceedings in error in the Supreme Court of the United States). That the law calls for the payment of the tax for the privilege of doing business in this State is clear by the provisions of Sections 1 and 2, Article 19 of the Constitution. See

tion 1 prohibits the licensing of all foreign insurance companies to do business in this State until they shall have complied with the laws of the State and shall have agreed to pay all taxes and fees as may at any time be imposed by law or Act of the Legislature. Section 2 of Article 19 prescribes one fee a foreign life insurance company is required to pay, namely, \$200.00 per annum. The amount of that fee may not be changed except by amendment of the Constitution. The latter part of Section 2 fixes the tax which foreign insurance companies were required to pay until otherwise provided by law, namely, the annual tax of two per centum on all premiums collected in the State after all cancellations are deducted. That was the tax imposed by law referred to in Section 1. That tax was subject to change by the Legislature. It was so changed in 1909 (Section 10478, *supra*) by allowing deductions for dividends paid to policyholders as well as all cancellations and by adding on annual tax of \$3.00 on each local agent. That Act made such taxes payable to the State Insurance Commissioner and provided that the tax should be in lieu of all other taxes or fees of any subdivision [fol. 194] or municipality of the State. The only material change made by the 1941 amendment is to increase the rate of tax from two per centum to four per centum.

It is clear that payment of such tax at the end of the licensing year was intended. The reason is that the amount of such tax is dependent on the amount of premiums collected during the taxing year and could not be determined until the end of such year. The tax imposed is clearly a privilege tax. *New York Life Insurance Company v. Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9. Pac. 2d 936. It is payable at the end of the year during which the privilege is granted by the State and exercised by the insurance company. This is in accord with the departmental construction of the law for more than thirty years. Such departmental construction does not appear to have been challenged by any foreign insurance company during the thirty-two years from 1909 until the amendment of 1941. This long-continued departmental construction should not be overturned without cogent reasons. *Globe Indemnity Company v. Bruce*, 81 Fed. 2d 143; *City of Tulsa v. Southwestern Bell Telephone Company*, 75 Fed. 2d 343; *United States v. Jackson*, 280 U. S. 183, 74 L. ed.

361; *Federal Land Bank v. Warner*, 292 U. S. 53, 78 L. ed. 1120.

Plaintiff cites and relies strongly on *Hanover Fire Insurance Company v. Carr*, 272 U. S. 494, 71 L. ed. 372, *supra*. It relies on the fact that the tax there involved was held to violate the 14th Amendment and deprived the insurance company of equal protection of the law. That case may well be distinguished from the case at bar as to the tax there held to be invalid. The Hanover Fire Insurance Company was an insurance company organized under the laws of the State of New York. It had for a number of years conducted a fire insurance business in South Chicago, [fol. 195] Cook County, Illinois, through agencies maintained there. In 1919, the State of Illinois enacted a statute which provided that each foreign corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privilege of doing business in the state equal to two per centum of the gross amount of premiums received by it during the preceding calendar year on contracts covering risks within the state, after certain deductions, and that such tax should be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality of the state, but this should not be construed so as to prohibit the levy and collection of any state, county or municipal taxes upon the real and personal property of such corporations. There was no contention as to the validity of that tax. The State of Illinois also had in effect a statute known as the Fire and Marine Insurance Act of 1869, as amended (Cahill's Rev. Stat. 1925, Chapter 73). Section 30 of said Act in part provided:

"Every agent of any insurance company, incorporated by the authority of any other state or government, shall return to the proper office of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—state, county, town and municipal—that other personal property is subject to at the place where located; * * *"

A general revenue Act of the State of Illinois, adopted in 1898, required personal property to be valued at its fair

cash value and set down in one column headed "Full Value" and one-half thereof to be ascertained and set down in another column headed "Assessed Value." In 1923, and for many years prior thereto, by what was called an equalization, systematically and intentionally carried out, the amount set down in the "Full Value" column was [fol. 196] not more than 60% of the actual fair cash value of personal property returned, and the amount set down in the "Assessed Value" column was not more than 30% of the actual, fair cash value, so that taxes on personal property would be levied and collected on an assessed value of 30% of the full or fair cash value of the property. For a long time and in a long line of decisions the Supreme Court of Illinois had held that the tax imposed by Section 30, supra, on the net receipts of foreign insurance companies was a tax on personal property. Accordingly, such net receipts had been treated as personal property. The law was enforced under that construction for a long time, with full acquiescence by the foreign insurance companies. But in June, 1923, in *People ex rel. Chicago v. Barrett*, 309 Ill. 53, 139 N. E. 903, the Supreme Court of Illinois held that said tax was an occupation tax and that the value of the net receipts of foreign insurance companies should not be reduced as in the case of personal property. The result was that the tax imposed by Section 30, supra, was more than trebled. It was this tax so increased which was attacked in the Hanover case, supra. It appears that after said decision the taxing authorities of Cook County, Illinois, valued and assessed the net premium receipts at their full value and levied a tax accordingly, and issued a warrant for the collection of the same. To prevent a distraint of its property, the Hanover Company brought an action against the tax collector for an injunction. The trial court denied relief and the Supreme Court affirmed the Superior Court. *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366. The case was taken by Writ of certiorari to the Supreme Court of the United States. There it was held in effect that the tax under the law as last construed by the Supreme Court of Illinois worked an unlawful discrimination against [fol. 197] the Hanover Fire Insurance Company. It was held that the authority or license granted under the 1919 Act for which the Hanover Company paid the 2% tax on gross premiums received by it, put said company on a level with domestic insurance companies doing a like business; that

compliance with Section 30 of said Act was not a condition precedent to permission to do business in Illinois. The tax under the law as previously construed, however, was in substance upheld. With reference thereto the court said:

“ * * * Under the previous decisions of the supreme court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the state, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies in such a construction of s 30 and in the practice under it. * * * ”

Final disposition of the Hanover case, as shown in Hanover Fire Insurance Company v. Harding, County Collector, 158 N. E. 849; is that the tax was upheld as upon a debased or decreased valuation of the net receipts in accordance with the former decisions. The 2% gross premium tax levied under the law in Illinois, almost the same as the Oklahoma law as construed by the department and the court below as a privilege tax or license tax, was upheld.

In the case at bar, the State exacts payment on or before the last day of February of each year of a valid privilege tax, based upon gross premiums collected for the privilege of doing business in this State during the license year, expiring on the date upon which the tax was required to be [fol. 198] paid, and also requires a showing of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year. As we have seen, the date when the payment for the privilege of doing business in the State is required is not material. It may be before or at the end of the license year.

Incidentally, it may be noted that the plaintiff did not protest payment of the tax as a whole. Examination of the

two protests filed, copies of which are attached to the amended petition, show that in the first protest, dated February 26, 1942, only \$1,651.31 was protested. That was protested as being tax in excess of 2% of all premiums collected in Oklahoma on insurance policies during the calendar year of 1941. In the second protest, dated March 17, 1942, \$2,936.33 was protested as a tax excessive and void because deductions claimed for cancellations were not allowed by the Insurance Commissioner. That made a total tax protested of \$4,587.64. The total amount paid and the amount sued for was alleged to be \$6,238.94. That leaves \$1,651.30 not protested. Evidently plaintiff, at the time it filed its protests, considered the 2% levied by the law under Section 10478, before its amendment, was valid tax. At least it did not protest that part thereof.

From the foregoing authorities we conclude that 36 O. S. 1941, Section 104, does not violate the 14th Amendment, and does not deprive the plaintiff of equal protection of the law.

We next consider the demurrer as applied to the second cause of action. The question is presented by plaintiff in its brief under the third proposition. Thereunder plaintiff contends that the "Cancellations" to be deducted as provided in the Constitution and statutes above referred to necessarily consist of the return of premiums, including [fol. 199] cash surrender values paid to policyholders, according to the terms and provisions of the life insurance contracts. The argument is that these funds are accumulated under the level premium plan by charging, during the early years of the policy, a net premium which is larger than is necessary to pay for the insurance in those years, with a view of accumulating a fund large enough to enable the company to meet the cost of insurance in the later years of life of the insured when the net premium is insufficient to pay for the current cost of protection, and that upon surrender of the policy by the insured, the payment to him of the "cash surrender value" is nothing more than a return of the excess part of the premiums theretofore charged and collected with an assumed rate of interest, and is but a return of money that in reality belongs to the insured. One difficulty with that theory is that the "assumed rate of interest" is not necessarily the actual rate of interest or income derived from the use of such money while in the hands of the insurer.

The defendants contend that the words "after all cancellations are deducted" refer only to the unearned parts of premiums on insurance policies collected in advance for a given term where the policies are canceled prior to the expiration of such term under the provisions of the policy or of the law relating thereto, and which unearned premiums are returned to the policyholder; that when used in connection with a life insurance policy, the words are applicable only in instances where policies have been procured by fraud, mistake, etc., and the policies are canceled and the premium is returned without respect to the length of time the policy has been in existence; that the return of the entire premium collected in such cases is called for because the policy never had any validity and no risk was ever assumed thereunder.

[fol. 206] There is no case cited by plaintiff directly in point. *Volunteer State Life Insurance Company v. Larson, State Treasurer (Fla.)*, 2 So. 2d 386, construed a statute similar to our constitutional and statutory provisions, which directed the State Treasurer in collecting the amount due upon a gross premium tax of 2% to omit or deduct "return premiums and cancellations." Our law directs deduction of "all cancellations and dividends paid to policyholders."

The Supreme Court of Florida, in *Volunteer State Life Insurance Company v. Larson, supra*, stated in substance, as contended for by plaintiff in the case at bar, that "the legislation is so clear and well fixed that the duty of the court is to follow the plain language implied by it." It was there held that deductions for surrender value of the policies, paid to the policyholders during the year, were required. But *State ex rel. Pacific Mutual Life Insurance Company v. Larson, State Treasurer, etc. (Fla.)*, 12 So. 2d 896, expressly overrules *Volunteer State Life Insurance Company v. Larson, supra*. In *State ex rel. Pacific Mutual Life Insurance Company v. Larson, supra*, it is pointed out that the cash surrender values on policies of life insurance are property rights generally created or established by the provisions of the contracts of life insurance. In the opinion it is stated:

"Various items, according to each contract, may enter into, include, and compose the property right recognized as the 'cash surrender value of a policy.' The payment by the insurance company to the policy-

holder of the 'cash surrender value of a policy' and the surrender thereof by the policyholder to the insurance company is not a 'cancellation' within the terms of the Act, but is simply a performance of the obligations of the contract as originally entered into by the parties. The policy, when cashed and surrendered as between the parties, becomes *functus officio*. It was not the intention of the Legislature when using the term 'cancellation' to make it embrace or include the 'cash surrender value of a policy of life insurance.' "

[fol. 201] We approve the statements there made. It is clear that the payments of the cash surrender value as provided in the policies are but the fulfillment of the contracts of insurance as written. It is no more a cancellation of the policy within the meaning of the Constitution and statutes than is the full payment on insurance policies at maturity or the payment of the principal amount of the contract upon the death of the insured. In either case the provisions of the policies are performed.

We hold that the payment for cash surrender value as provided for in the policy is not a cancellation within the terms or within the meaning of the Constitution and statutes. There was no error in sustaining the demurrer as to the second cause of action.

Under the second proposition in plaintiff's brief, going to the third cause of action, it is contended that the increase in the tax from 2% to 4% effective April 25, 1941, could in no event operate as to premiums collected by plaintiff prior to April 25, 1941.

As applied to plaintiff's third cause of action, the petition as amended does not challenge the validity of the increase in the rate of tax from 2% to 4% as to premiums collected after April 25, 1941. It goes only to the validity of the increase of the tax as applied to premiums collected in 1941, prior to April 25th. That part of the tax was not specifically protested.

68 O. S. 1941, Section 15.50, under which authority for an action of this nature is given, requires that the notice (protest) to the collecting officer shall show the "grounds of complaint." The Attorney General makes no contention that the notice or protest here involved is insufficient. We therefore treat it as sufficient to raise the question here presented.

The sole question involved is whether increase in rate of [fol. 202] taxes to be paid is legally applicable to premiums collected in 1941 but prior to April 25th, the effective date of the Act raising the rate of the tax. By the language used in the statute as amended, the increased rate is not specifically made retroactive. The general rule is that statutes are to be construed as having a prospective operation unless the purpose and intention of the Legislature to give them retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt, the doubt must be resolved against the retrospective effect. *Dood et al. v. Keel et al.*, 29 Okla. 325, 116 Pac. 777; *People ex rel. Mutual Trust Company of Westchester County v. Miller, Comptroller*, 177 N. Y. 51, 69 N. E. 124; *Blodgett v. Holden*, 275 U. S. 142, 72 L. ed. 206; *Lewellyn v. Frick*, 268 U. S. 238, 69 L. ed. 934.

In *Good v. Keel*, supra, it is said:

"This general rule has been applied to a great variety of statutes, including the uniform negotiable instruments law, usury laws, statutes levying taxes, relating to defenses to actions on insurance policies, relating to damages for wrongs, providing for rendition of deficiency judgments upon sale of mortgaged premises, limiting the time for the commencement of actions, declaring certain contracts void, regulating parties who may sue for death by wrongful act, or the manner of distribution of the amount recovered, modifying the fellow servant rule, relating to plans for bridges over railroad tracks, relating to mechanics' liens, defining the boundary of a city, etc. * * *

This being a tax for the privilege of doing business within the State during the year for which the privilege is granted by the State and exercised by the insurance company, as we have held, plaintiff became subject to the increased rate during the license year. But there is nothing in the Act which specifically provides that the increased rate should apply to premiums collected prior to the effective date of the Act increasing the rate. Neither can it be said that such [fol. 203] application is necessarily implied from the language used in the Act. Tested by the rule stated above, the Act must be construed so as to apply the increased rate only to the premiums collected after the effective date of the Act.

The petition alleged the amount of premiums collected in 1941 before April 25th, and alleged the amount of dividends paid to policyholders during that time. Therefore, plaintiff's petition as to the third cause of action stated facts sufficient to constitute a cause of action for the recovery of the amount of taxes, hereinafter set forth, paid by plaintiff in error by reason of the application of the increased rate to the premiums collected prior to the effective date of the act increasing the rate.

The parties have filed herein their joint motion and stipulation whereby they agree that there exists no issue as to the facts set out in the petition and that the amount of the tax involved in said third cause of action is the sum of \$847.18, and pray that this court completely determine and adjudicate this action. This court is vested with jurisdiction of the parties and subject matter involved. Further proceedings in the trial court could result in no benefit to any of the parties and would only involve the litigants in more expense and delay and nothing could be gained thereby. The approval of said stipulation is in the furtherance of justice.

The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.

The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed.

The Court, in consideration of the premises, finds and determines that \$847.18 of the \$6,238.94 sued for by plaintiff in error was illegally collected, as not being due the State of Oklahoma, but that the remainder of said sum, [fols. 204-205] to-wit \$5,391.76, was legally collected, as being due the State of Oklahoma.

It is, therefore, ordered, adjudged and decreed by the Court that the first and second causes of action of the petition of plaintiff in error be and the same are hereby dismissed and that the legal amount of taxes due by plaintiff in error to the State of Oklahoma is the said sum of \$5,391.76.

It is also ordered, adjudged and decreed by the Court that the said sum of \$847.18 so paid is in excess of the legal and correct amount due by plaintiff in error to the State of Oklahoma, and defendants in error are hereby ordered

and directed to pay said excess to plaintiff in error and to take its receipt therefor.

It is further ordered and adjudged that the costs herein be paid by plaintiff in error.

Concur: Corn, CJ, and Osborn, Bayless, Welch, Hurst, Davidson and Arnold, JJ.

Dissent: Gibson, VCJ, dissents to paragraph 8 of the syllabus and to that part of the opinion of which said paragraph 8 is representative, but concurs in the remainder of said opinion.

[fol. 206] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE
STATE OF OKLAHOMA TO THE SUPREME COURT OF THE UNITED
STATES AND ASSIGNMENT OF ERRORS—Filed December 12,
1944

To the Honorable Chief Justice of the Supreme Court of the
State of Oklahoma:

The Lincoln National Life Insurance Company, a corporation, Appellant in the above-entitled cause, respectfully shows by this petition and the assignment of errors hereinafter set forth and the statement as to jurisdiction accompanying this petition, that in the records, proceedings, decision, and final judgment of the Supreme Court of the State of Oklahoma in cause No. 31338, styled "The [fol. 207] Lincoln National Life Insurance Company, a corporation, Plaintiff in Error, vs Jess G. Read, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error," the said Court being the highest court of the State of Oklahoma in which a decision could be had in said suit, and the decision and judgment therein being final, manifest error has occurred, greatly to the damage of this petitioner.

That as appears from the records, proceedings, decision, and judgment in said cause, there was drawn in question the validity of statutes of the State of Oklahoma on the ground of their being repugnant to the Constitution or

laws of the United States and the decision and final judgment in said cause is in favor of their validity, the said statutes of the State of Oklahoma being Section 1, Chapter 1a, Title 36, page 121, Session Laws of Oklahoma, 1941 (36 Oklahoma Statutes 1941, section 104), amendatory of Section 10478, Oklahoma Statutes 931; Sections 1 and 2, Article XIX of the Constitution of the State of Oklahoma.

Petitioner avers that on the 27th day of March, 1942, it filed its petition in the District Court of Oklahoma County, Oklahoma, for the recovery of certain taxes levied under the above mentioned 1941 statutes of Oklahoma, which taxes it had paid involuntarily and under protest. Petitioner showed under the first cause of action alleged in its said petition and its amended petitions filed in said cause that it is a life insurance company organized under [fol. 208] the laws of Indiana, and for many years duly admitted to do business in Oklahoma, and had established therein at great expense a valuable life insurance business; that the aforementioned statutes of Oklahoma imposed exclusively upon foreign insurance companies a tax upon gross premiums collected by such companies in Oklahoma; that the rate of such tax was increased from 2% to 4% by the aforementioned 1941 statute; that said gross premium tax laws are not regulatory but revenue-producing measures and impose drastic, heavy, and coercive penalties against foreign insurance companies failing to comply therewith; that similar domestic insurance companies do not share in such tax burdens; that said statutes impose upon petitioner and other foreign insurance companies within the jurisdiction of the State of Oklahoma unequal, arbitrary, and discriminatory tax burdens and deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

Further allegations and claims not material to an appeal to the United States Supreme Court were included in said petition and amended petitions of petitioner and carried forward under the second and third causes of action alleged in the second amended petition and were alleged only in the event petitioner failed to sustain its said first cause of action.

Petitioner avers that on the 11th day of September, 1942, the said District Court of Oklahoma County, Oklahoma, rendered its judgment, sustaining the demurrer of Appellees to the second amended petition of petitioner, and dis-

missed said cause, and wherein it ruled that neither Section 2, Article XIX of the Constitution of Oklahoma; Section [fol. 209] 10478; Oklahoma Statutes 1931; Chapter 1a, Title 36, page 121, Oklahoma Session Laws, 1941, nor the construction or application thereof by the Insurance Commissioner of Oklahoma violate the Fourteenth Amendment of the Constitution of the United States.

Petitioner avers that an appeal from said judgment to the Supreme Court of the State of Oklahoma was duly perfected and the final decision of said Court was made, rendered, filed, and entered on the 21st day of November, 1944. Thereafter no petition for rehearing has been filed in said cause and the time allowed by the rules of said Court for the filing of a petition for rehearing expired on the 6th day of December, 1944.

Petitioner further avers that the Supreme Court of the State of Oklahoma in the decision and final judgment above mentioned affirmed the aforesaid judgment of the trial court, dismissing the first cause of action contained in said petitions of petitioner, and ruled that the imposition of gross premium tax on foreign insurance companies for the privilege of doing business within the State, as provided by Sections 1 and 2 of Article XIX of the Constitution of the State of Oklahoma and Section 10478, Oklahoma Statutes 1931, and 36 Oklahoma Statutes 1941, section 104, does not violate the Fourteenth Amendment of the Federal Constitution, though no like tax is exacted from domestic insurance companies, thus committing the manifest error herein, complained of.

[fol. 210]

ASSIGNMENT OF ERRORS

Petitioner assigns the following errors in the record, proceedings, decision, and final judgment in said cause, to-wit:

(1) The Supreme Court of the State of Oklahoma erred in adjudicating and deciding that Section 1, Chapter 1a, Title 36, page 121, Session Laws of Oklahoma, 1941, (36 Okla. Stat. 1941, sec. 104), approved and in force April 25th, 1941 (hereinafter referred to as the 1941 statute), was and is a good and valid enactment, and is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) The Supreme Court of the State of Oklahoma erred in denying the claim of petitioner that said 1941 statute was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

... * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

in that petitioner, being a corporation organized under the insurance laws of the State of Indiana, and having complied with the conditions precedent to admission into the State of Oklahoma, including the payment of an entrance fee, and having secured the license, permission, and authority of the State of Oklahoma to transact said business of insurance therein, was subjected by said 1941 statute to an arbitrary and discriminatory 4% tax on gross premiums collected in Oklahoma, while domestic insurance companies of the State of Oklahoma doing identically the same kind of business of insurance as petitioner, were and are not subject to a tax on gross premiums collected by such domestic companies in Oklahoma, or any other similar tax. [fol. 211] (3) The Supreme Court of the State of Oklahoma erred in adjudicating and deciding that said 1941 statute, as construed and applied by appellee, the Insurance Commissioner of the State of Oklahoma, and by the trial court, in levying against petitioner a 4% tax on its gross premiums collected in Oklahoma during the twelve months next preceding January 1st, 1942, is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) The Supreme Court of the State of Oklahoma erred in denying the claim of petitioner that the provisions of Sections 1 and 2, Article XIX of the Constitution of Oklahoma, and said 1941 statute, as construed and applied by the Insurance Commissioner of Oklahoma, discriminate against petitioner and in favor of domestic life insurance companies, and deprives petitioner of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of the State of Oklahoma erred in adjudging and decreeing that by the provisions of Section 1, Article XIX of the Constitution of Oklahoma,

petitioner agreed, as a condition of its admission and permission to do business in the State of Oklahoma, to pay the 4% gross premium tax imposed by said 1941 statute. By reason whereof Section 1, Article XIX of the Constitution of Oklahoma, as so construed and applied by the Supreme Court of Oklahoma, exacts as a condition of a foreign insurance company engaging in business within Oklahoma that it waive its rights under the Federal Constitution and submit to arbitrary and discriminatory taxation, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(6) The Supreme Court of the State of Oklahoma erred in adjudging and decreeing that the tax exacted from petitioner by said 1941 statute is a valid privilege tax, and does not deny petitioner the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, despite the fact that according to said Court's construction of said statute, the payment of said tax is based on business transacted in the State of Oklahoma and is exacted at the end of the license year for the privilege of doing business in the State during the license year ending at the time of such payment, and domestic companies do not share the burden of said tax.

(7) The Supreme Court of the State of Oklahoma erred in denying the claim of petitioner that an arbitrary and discriminatory privilege tax, which is imposed exclusively on foreign insurance companies doing business in the State of Oklahoma, and which is made to apply on the basis of business transacted by such companies in said State after their permissive entry into said State, as provided by said 1941 statute, denies to petitioner and other foreign insurance companies within the jurisdiction of said State the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 213]. (8) The Supreme Court of the State of Oklahoma by its final judgment in this cause held and adjudged that the 4% gross premium tax imposed by said 1941 statute is exacted at the end of the license year for the privilege of doing business in the State of Oklahoma during the license year expiring on the date upon which the tax was required to be paid, and said statute requires a showing

of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year. By reason whereof, said 1941 statute as so construed and applied by the Supreme Court of Oklahoma makes past compliance therewith and the payment of the arbitrary, unequal, and discriminatory tax imposed thereby a condition precedent to a renewal of the annual license required of foreign insurance companies, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) The Supreme Court of the State of Oklahoma erred in denying the claim of petitioner that the illegal tax imposed by said 1941 statute, and which becomes due at the end of each license year, cannot be transformed into a valid license fee and cannot be exacted as a valid condition precedent to the issuance of the renewal license for the ensuing license year, and thereby circumvent the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(10) The Supreme Court of the State of Oklahoma erred in adjudging and decreeing that the decision of the Supreme Court of the United States in *Hanover Fire Ins. Co. v. Harding*, 272 U. S. 494, 71 L. ed. 372, is distinguishable from [fol. 214] the cause and that therefore said 1941 statute does not deny petitioner the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(11) The Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court in sustaining appellees' demurrer to the first cause of action contained in the petition of petitioner; and erred in dismissing the first cause of action of the petitioner of petitioner, and in not granting the relief in said petition prayed for; which said actions, rulings, and adjudication are in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and deny to petitioner the equal protection of the laws thereby guaranteed to it.

PRAYER

Wherefore, petitioner prays for the allowance of an appeal to the Supreme Court of the United States from the said judgment of the Supreme Court of the State of Oklahoma, and for such other and further process and pro-

ceedings as will enable petitioner to obtain a review of the case and a correction of said errors by the said Supreme Court of the United States, and also prays that an order be made fixing the amount of the security which petitioner as appellant shall give and furnish upon appeal; and that upon the giving of said security, all further proceedings in the Supreme Court of the State of Oklahoma be suspended and stayed until the determination of said appeal by [fols. 215-264] the Supreme Court of the United States; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated by the clerk of the Supreme Court of the State of Oklahoma, may be sent to the Supreme Court of the United States.

And petitioner further prays that by reason of such errors, or either of them, the said judgment and decision of the Supreme Court of the State of Oklahoma in this cause be reversed, and a judgment rendered in favor of petitioner.

Russell V. Johnson, Charles E. France, Attorneys
for Petitioner and Proposed Appellant.

[fol. 265]

[File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed December 12, 1944

The Appellant in the above-entitled suit having presented its petition for appeal on the 12th day of December, 1944, and prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered by the Supreme Court of the State of Oklahoma on the 21st day of November, 1944, in the case of The Lincoln National Life Insurance Company, a corporation, against Jess G. Read, the Insurance Commissioner of the [fol. 266] State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, numbered 31338, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided, it is now here

Ordered, that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma in the above-entitled cause as prayed in said petition. And it is further

Ordered, that the Clerk of the Supreme Court of the State of Oklahoma shall prepare and certify a transcript of the record, proceedings, and judgment in this cause, and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within forty (40) days from the date hereof. And it is further

Ordered, that said Appellant shall give good and sufficient security in the sum of One Thousand (\$1000.00) that said Appellant shall prosecute said appeal to effect, and if said Appellant fail to make its plea good, it shall answer all damages and costs.

The Said Appellant now presenting a bond in the sum of One Thousand (\$1000.00) Dollars, with *Central Surety and Insurance Corporation*, a corporation, as surety, it is [fols. 267-268] Ordered, that the same be, and is hereby approved. The appeal shall operate as a supersedeas and the mandate and all other proceedings in the Supreme Court of the State of Oklahoma in said cause be, and they are hereby stayed pending said appeal.

Dated the 12 day of Dec., 1944.

N. S. Corn, Chief Justice of the Supreme Court of the State of Oklahoma.

[fols. 269-274] Bond on appeal for \$1,000.00—approved and filed Dec. 12, 1944, omitted in printing.

[fols. 275-277] Citation in usual form showing service on Randall S. Cobb, filed December 12, 1944, omitted in printing.

[fol. 278] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed
December 13, 1944

To the Clerk of the Supreme Court of the State of Oklahoma:

You are hereby directed to incorporate in the transcript of the record in cause No. 31338, styled "The Lincoln National Life Insurance Company, a corporation, Plaintiff in Error, vs. Jess G. Read, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error," in the Supreme Court of the State of Oklahoma, to be prepared and transmitted to the Supreme Court of the United States pursuant to the order of December 12th, 1944, allowing appeal herein, the portions of such record indicated as follows:

(1) Case-made from the District Court of Oklahoma County, State of Oklahoma, and certificates thereto attached.

(2) Petition in error.

[fol. 279] (3) Certificate of appeal.

(4) That portion of the brief of plaintiff in error filed July 12th, 1943, to-wit:

(a) The first paragraph following "Statement of the Case," appearing on page one of said brief.

(b) Paragraph numbered 3 appearing on pages 17 and 18 of said brief.

(5) That portion of the brief of defendants in error August 16th, 1943, appearing on page 2, thereof.

(6) Journal entry showing case orally argued and submitted, entered February 8th, 1944.

(7) Journal entry of opinion filed April 18th, 1944.

(8) Journal entry of order correcting opinion filed April 29th, 1944.

(9) Journal entry of order staying mandate filed May 1st, 1944.

(10) Motion for extension of time to file petition for rehearing filed May 1st, 1944.

(11) Journal entry of order entered May 2d, 1944, granting extension of time to file petition for rehearing.

(12) Petition for rehearing and that portion of the brief in support thereof designated as "I", all of which appears on pages 1 to 11 thereof, filed May 18th, 1944.

(13) Journal entry of order denying petition for rehearing entered September 12th, 1944.

(14) Journal entry of order staying mandate entered September 18th, 1944.

(15) Joint motion and stipulation filed November 14th, 1944.

[fol. 280] (16) Journal entry of order entered November 20th, 1944, withdrawing opinion of April 18th, 1944.

(17) Journal entry of opinion filed November 21st, 1944.

(18) Journal entry of order staying mandate entered November 27th, 1944.

(19) Petition for appeal from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States, and assignment of errors, filed December 12th, 1944.

(20) Statement as to jurisdiction on appeal and exhibits attached thereto, filed December 12th, 1944.

(21) Journal entry of order allowing appeal filed December 12th, 1944.

(22) Bond and approval thereof filed December 12th, 1944.

(23) Journal entry of citation and acknowledgment of service filed December 12th, 1944.

(24) Proof of service and acknowledgment of service filed December 12th, 1944.

(25) Praecipe for transcript of record on appeal and acknowledgment of service.

Dated the 13th day of December, 1944.

Russell V. Johnson, Attorney for Appellant The Lincoln National Life Insurance Company.

Service of the above and foregoing praecipe and receipt of a true copy thereof is acknowledged this 13th day of December, 1944.

Fred Hansen, First Assistant Attorney General, Attorney for Appellees; Jess G. Read, the Insurance Com'r of the State of Oklahoma; and A. S. J. Shaw, State Treasurer of the State of Oklahoma.

[fol. 281] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 282] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
OF PARTS OF RECORD TO BE PRINTED, WITH PROOF OF SERVICE
—Filed January 11, 1945

Appellant hereby states that it intends to rely upon the following points:

I

Section 1, Chapter 1a, Title 36, page 121, Session Laws of Oklahoma 1941 (Tit. 36, Okla. Stat. 1941, sec. 104), approved and in force April 25th, 1941, Section 10478, Okla. Stat. 1931 (substantially the same as said 1941 statute except rate of tax is 2% instead of 4%), and Section 2, Article XIX of the Constitution of Oklahoma, and each of them, are unconstitutional and void, in that said statutes deny to Appellant the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II

The tax laws of the State of Oklahoma set forth in Point I hereof, and each of them, as construed and applied by the Insurance Commissioner, the trial court, and the Supreme Court of the State of Oklahoma, impose a discriminatory, unequal, and unjust tax upon the business of foreign insurance companies within the jurisdiction of the State of Oklahoma, and deny to Appellant the equal protection of the laws, and are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 283]

III

Section 1, Article XIX of the Constitution of the State of Oklahoma, as construed and applied by the Supreme Court of the State of Oklahoma, exacts as a condition of Appellant's engaging in business within the State of Oklahoma that it waive its rights under the Federal Constitu-

tion and submit to arbitrary, unequal, and discriminatory taxation, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

IV

The tax laws of the State of Oklahoma set forth in Point I hereof, and each of them, are unconstitutional and void, in that said laws directly affect, burden, and impede commerce between Oklahoma and other States, in violation of Section 8, Article I of the Constitution of the United States.

V

The tax laws of the State of Oklahoma set forth in Point I hereof, and each of them, as construed and applied by the Insurance Commissioner, the trial court, and the Supreme Court of said State, are unconstitutional and void, in that said laws directly affect, burden, and impede commerce between Oklahoma and other States, in violation of Section 8, Article I of the Constitution of the United States.

PARTS OF RECORD TO BE PRINTED

Appellant hereby makes reference to the transcript of the record filed herein and designates the parts thereof which it deems necessary for the consideration of the foregoing points, as follows:

- (1) Petition and exhibits attached thereto. Pages 10 to 32, inclusive.
- (2) Summons and return. Pages 35 to 37, inclusive.
- (3) Amended petition. Pages 42 and 55, inclusive. Omit exhibits on pages 56 to 64, inclusive, but show that the exhibits [fol. 284] attached to the amended petition are duplicates of the exhibits attached to the original petition.
- (4) Second amended petition, the court order endorsed thereon. Pages 68 to 82, inclusive. Omit exhibits on pages 83 to 90, inclusive, but show that the exhibits attached to the second amended petition are duplicates of the exhibits attached to the original petition.
- (5) Demurrer. Pages 92 to 93, inclusive.
- (6) Journal entry. Pages 96 to 102, inclusive.
- (7) Order for revivor. Pages 118 to 120, inclusive.
- (8) Petition in error in the Supreme Court of Oklahoma. Pages 1 to 5, inclusive.

(9) Extracts from brief of plaintiff in error. Pages 129 to 130, inclusive.

(10) Extracts from brief of defendants in error. Pages 131 to 132, inclusive.

(11) The last three paragraphs of the journal entry of opinion filed April 18th, 1944, on page 158. Show that the remainder of said opinion is duplicated by that part of the opinion filed November 21st, 1944, appearing on page 182 and continuing to the end of the third line on page 203.

(12) Petition for rehearing. Pages 166 to 168, inclusive.

(13) Journal entry—petition for rehearing denied. Page 177.

(14) Joint motion and stipulation. Pages 179 to 180, inclusive.

(15) Journal entry—order withdrawing opinion. Page 181.

(16) Journal entry—opinion filed November 21st, 1944. Pages 182 to 204, inclusive.

(17) Petition for appeal and assignment of errors. Pages 206 to 215, inclusive. The statement as to jurisdiction on appeal and exhibits attached thereto, appearing on pages [fol. 285] 216 to 264, inclusive, are required by Rule 12, paragraph 5, to be printed when the case is docketed.

(18) Order allowing appeal. Pages 265 to 267, inclusive.

(19) Bond. Pages 268 to 269, inclusive.

(20) Citation and acknowledgment of service. Pages 274 to 275, inclusive.

(21) Proof of service and acknowledgment of service. Pages 276 and 277, inclusive.

(22) Praecipe for transcript of record on appeal and acknowledgment of service. Pages 278 to 280, inclusive.

(23) Certificate of Clerk of Supreme Court of Oklahoma. Page 281.

Russell V. Johnson, Charles E. France, 1706 First National Building, Oklahoma City 2, Oklahoma, Attorneys for Appellant.

A copy of the above and foregoing is acknowledged this 8th day of January, 1945.

Randell S. Cobb, Attorney General of the State of Oklahoma. Fred Hansen, First Assistant Attorney General; State Capitol Building, Oklahoma City 5, Oklahoma, Attorneys for Appellees.

[fol. 285a] [File endorsement omitted.]

[fol. 286] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—February 12, 1945.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 49,286 Oklahoma, Supreme Court. Term No. 833. The Lincoln National Life Insurance Company, Appellant, vs. Jess G. Read, Insurance Commissioner of the State of Oklahoma, et al. Filed January 11, 1945. Term No. 833 O. T. 1944.

(6763)